

(30,502)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924

No. 537

ARMOUR & COMPANY, PETITIONERS,

*vs.*

FORT MORGAN STEAMSHIP COMPANY, LIMITED; THE  
AMERICAN SURETY COMPANY OF NEW YORK, AND  
CENTRAL AMERICAN CATTLE COMPANY

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

	Page
Record from the district court of the United States, eastern district of Louisiana .....	1
Appearances of counsel .....	1
Libel .....	2
Exhibit—United Fruit Co. bill of lading.....	9
Stipulation for costs.....	31
Admiralty warrant and marshal's return.....	32
Claim of Fort Morgan Steamship Co.....	34
Release bond.....	36
Exceptions to libel.....	38
Order maintaining exceptions.....	41
Supplemental libel.....	42
Exhibits A, B, and C—Statement of Lloyd's Agent.....	44
Exhibit D—Live-stock contract between Central American Cattle Co., Inc., and Armour & Co., November 29, 1917.....	48
Exceptions of Fort Morgan Steamship Co.....	50
Submission of exceptions.....	52

# INDEX

	Page
Opinion, Foster, J., on exceptions.....	53
Order overruling exceptions.....	54
Order granting claimant thirty days to plead.....	55
Answer of Fort Morgan Steamship Co.....	56
Respondent's Exhibit A—Charter-party between Gulf Coast Plantation Co. and the Central American Cattle Co., Inc., August 23, 1917.....	70
Respondent's Exhibit B—Contract between Central American Cattle Co., Inc., and Armour & Co., October 3, 1917.....	78
Respondent's Exhibit C—Live-stock contract between Central American Cattle Co. and Armour & Co., November 29, 1917...	83
Petition of Fort Morgan Steamship Co., Ltd.....	86
Citation and service.....	92
Exceptions and answers of the Central American Cattle Co.....	94
Order overruling exceptions.....	104
Order to show cause why cause should not be set for hearing.....	104
Note of evidence for libellant.....	107
Stipulation re testimony.....	109
Testimony of Victor H. Munnecke.....	109
Ed. J. Mitchell.....	146
A. G. Frisble.....	163
W. C. Kirk.....	168
Exhibit "Chicago-1"—Agreement between Central-American Cattle Co. and Armour & Co., January 15, 1918.....	178
Exhibit "Central-America Chicago-1"—Affidavit of E. J. Mitchell .....	186
Exhibit "Central-America Chicago-2"—Receipt of Armour & Co. for 420 head of live steers, November 29, 1917.....	187
Exhibit "C-2"—Translation of survey.....	188
Exhibit "C-3"—Letter, Armour & Co. to Wilcox, Peck & Hughes, December 2, 1917.....	201
Exhibit "D-1"—Statement, Armour & Co. to Central-Amer- ican Cattle Co., Inc., February 13, 1918.....	202
Exhibit "D-2"—Receipt, Central-American Cattle Co., Inc., to Armour & Co. for January 30, 1918.....	203
Exhibit "D-3"—Statement, Armour & Co. to Central-Amer- ican Cattle Co., Inc., March 9, 1918.....	204
Exhibit "D-4"—Statement of Lloyd's Agent, December 31, 1917 .....	205
Exhibit "D-5"—Statement of Lloyd's Agent, January 11, 1918 .....	207
Exhibit "D-6"—Final statement of expenses, etc., October 2, 1918.....	208
Exhibit "E"—Certificate, etc., as to incorporation of Armour & Co.....	210
Exhibit "Armour B-1"—Radiogram, master of "Fort Mor- gan" to "Ellis," December 4, 1917.....	218
Exhibit "Armour B-2"—Radiograms, December 4, 1917....	219
Exhibit "Armour B-3"—Radiogram, master of "Fort Mor- gan" to "Ellis," December 5, 1917, and other radiograms.	221



# INDEX

iii

	Page
Note of evidence for claimant.....	224
Objections to testimony.....	225
Stipulation re testimony.....	227
Testimony of Thomas J. Johannasen.....	229
Robert T. Burge.....	349
Captain Olaf H. Olsen.....	374
Victor Leovy.....	395
Note of evidence for Central American Cattle Co.....	397
Stipulation re testimony.....	399
Testimony of Oscar R. Whilden.....	400
Exhibits Whilden 2 and 3—Affidavits of Stewart E. McMillin..	421
Intervening libel of the Central American Cattle Co. and order to file same.....	426
Exhibit "Intervening Libelant B"—Statement.....	431
Motion of Central-American Cattle Company, Inc., to discontinue in- tervening libel and order granting same.....	432
Intervening libel of P. G. Jansen.....	433
Motion of P. G. Jansen to discontinue intervening libel, etc., and order granting same.....	436
Opinion, Foster, J.....	437
Petition for rehearing.....	442
Order overruling petition for rehearing.....	444
Decree .....	445
Petition of libelant for appeal and order granting same.....	446
Assignments of error.....	448
Appeal bond.....	451
Agreement as to transmission of certain exhibits in the original....	453
Clerk's certificate.....	455
Proceedings in the United States circuit court of appeals, fifth cir- cuit .....	457
Order granting leave to file stipulation.....	457
Stipulation re exhibits.....	458
Exhibit—Petition for writ of attachment and order allowing same in district court of Orleans Parish.....	459
Argument and submission.....	460
Opinion, Walker, J.....	469
Judgment .....	471
Petition for rehearing.....	471
Order denying petition for rehearing.....	473
Clerk's certificate.....	473
Order granting petition for certiorari.....	474

222

## TRANSCRIPT OF RECORD.

UNITED STATES OF AMERICA, DISTRICT COURT  
OF THE UNITED STATES, EASTERN DIS-  
TRICT OF LOUISIANA, NEW ORLEANS DI-  
VISION.

ARMOUR & COMPANY,

versus

No. 15,811

STEAMSHIP "FORT MORGAN."

IN ADMIRALTY.

Appearances:

Messrs. John D. & M. A. Grace & E. H. Grace, proctors  
for Armour & Company, Appellant.

Messrs. Denegre, Leovy & Chaffe, proctors for Fort  
Morgan Steamship Company, Ltd., and the American  
Surety Company of New York, Appellees;

Messrs. Terriberry, Rice & Young, proctors for Central-  
American Cattle Co., Incorporated, impleaded appellee.

APPEAL from the District Court of the United States  
for the Eastern District of Louisiana, New Orleans  
Division, to the United States Circuit Court of Ap-  
peals for the Fifth Circuit, returnable within 30  
days from December 20th, 1922, at the City of New  
Orleans, Louisiana.

Two extensions of time granted by the United States  
Circuit Court of Appeals bringing the return day up to  
and including July 16, 1923.

## LIBEL.

Filed January 25, 1918.

District Court of the United States for the Eastern  
District of Louisiana, New Orleans Division, Honorable  
Rufus E. Foster, Judge.

Armour and Company, exhibit this libel against the  
Norwegian Steamship Fort Morgan, whereof T. Johannesen  
now is or lately was master, against her tackle, apparel  
and furniture, and against all persons claiming any right,  
title or interest therein, and thereupon in a cause of contract,  
civil and maritime, libelant articulately propounds as follows:

First. That libelant, Armour & Company is a corporation  
created and existing under the laws of the state of Illinois,  
with its domicile in the city of Chicago, in the said state.

Second. That at and during all the time hereinafter  
mentioned as well as immediately prior thereto, the said  
Norwegian Steamship Fort Morgan, was engaged as a common  
carrier upon the high seas and between port and places in  
different countries, particularly between the port of Port  
Limon, Costa Rica and Jacksonville, Fla., U. S. A.

Third. That on or about the 28th day of November, 1917,  
there was laden on board of the said steamship Fort Morgan,  
at the port of Limon, Costa Rica, four hundred and twenty  
head of live cattle belonging to libelant, and to libelant  
consigned, destined for delivery to libelant at Jacksonville,  
Fla., U. S. A. And in acknowledgement

3 of the delivery of said cattle on board of said vessel, the master thereof signed a certain bill of lading and delivered same to libellant at said port of lading, showing that said cattle was received on board of said vessel, in good order and condition, copy of which is hereto attached and hereby made part hereof.

Fourth. That the said cattle were all safely placed on board of said vessel, were properly stowed and well tied to make the voyage, without danger to them, and would have safely made the said voyage but for the unseaworthy condition of the said vessel.

Fifth. That after receiving said cattle on board of said steamship, she left said port, bound for the said port of Jacksonville, Fla., and at this time had a list, which constantly increased as she moved along on her way to sea until, when on arriving at a place not far distant from the bar lying off of said port, the vessel had listed under its continuing heel so far to one side, that the officers and men composing the crew of said vessel positively refused to go further and insisted upon returning with said vessel to her port of departure, they entertaining grave fears for the safety of said vessel and for themselves.

Sixth. That accordingly, the said steamship put back to the port of Limon, when on its approach to and arrival at said port, the said vessel sounded distress signals, calling for help, being in a condition which threatened to capsize said vessel, she having a list, or inclination to one side of about thirty-five degrees.

Seventh. That the master of said vessel reported to the Port Captain of Limon that the only thing

4           he deemed possible to straighten up the ship and save her from disaster was to put the said ship alongside of the wharf and proceed immediately to unload the cattle, most of which he then believed dead or in bad condition.

Eighth. That the unloading of said cattle was done at libelants expense, for account of whom it might concern, and but for which service said vessel and all of said cattle would have become a total loss.

Ninth. That prior to, at the inception of and after the commencement of said voyage from port of Limon, the said steamship was in an unseaworthy condition, and not suited to the carriage of such a deck load of cattle as she undertook to transport from Port Limon to Jacksonville, Fla., for libelant. That among various conditions of unseaworthiness of said steamship existing before and at time of said sailing libelant avers that the fore peak tank was empty, that number one tank contained not more than fourteen inches of water, and was not filled to capacity because it was in such a leaky condition, it would not hold more than fourteen inches of water, although its full capacity was requisite to assist in giving the ship necessary stability to make her seaworthy. The after peak tank was empty and not in condition to be used for water. That water for boiler use, and for use of cattle as well as for ships general use was taken from tanks of said vessel reducing weight of water below the ship's water line.

5           Tenth. Notwithstanding the fact that all of said 420 head of cattle were stowed above the shelter deck, a large quantity of coal was stowed on said ship in the shelter deck bunker, giving a heavy top

weight, with insufficient ballast making this vessel top heavy and consequently liable to turn over, rendering her unseaworthy.

Eleventh. That by reason of the breaking up of the said voyage, and the failure of the said steamship Fort Morgan to make due delivery to libelant of the said 420 head of cattle laden on board said vessel, libelant has suffered damages in the full sum of thirty-one thousand five hundred dollars, in this, that the said cattle, laid down at Jacksonville, Fla., their said destination (a service said vessel undertook to perform and for which it was paid) was well and truly worth seventy-five a head, or a total for the four hundred and twenty head of the sum of thirty-one thousand five hundred dollars (\$31,500.00), lawful current money of the United States.

Twelfth. That for the purpose of minimizing its damages, libelant, did for the account of whom it might concern aid and assist the master of said vessel to save whatever cattle could be saved out of said shipment, and to this end upon the return of said vessel to Port Limon as aforesaid, commenced the work of rescuing the cattle without avoidable delay. It was then ascer-  
 6           tained that two hundred and ten head of said cattle had been killed by and because of said vessel, careening to one side, as aforesaid; and it becoming necessary to have said dead cattle transported out of the said harbor and thrown overboard at sea, this was done. That the value of each and every one of said four hundred and twenty-head of cattle laden on board of said vessel, freight paid, as was done, was at least seventy-five dollars a head; hence the damages occasioned in the loss of said two hundred and ten head of cattle killed on board said vessel and thrown overboard at sea,

amounted to fifteen thousand seven hundred and fifty dollars (\$15,750.00). That on account of injuries received while on board said steamship as aforesaid, eight other of said cattle died after they were placed on shore, although given every proper attention, and thus a further loss was suffered of six hundred dollars (\$600.00). That the remaining two hundred and two head of cattle had been so injured and sickened on board said steamship because of the careening of said vessel, their value on shore at Port Limon has been reduced to a sum not in excess of twenty-five dollars per head, thus showing a still further loss of fifty dollars a head, or a total on the said 202 head of cattle of not less than Ten Thousand one hundred dollars (\$10,100.00). Hence, notwithstanding libelants best efforts to minimize said losses in the premises, the actual loss in respect to the matters in this article hereinbefore set out amounts to twenty-six thousand four hundred and fifty dollars, together with expenses, costs, and charges incurred by libelant

7 in making survey of said vessel discharging the cattle on board thereof, as aforesaid, and sending the discharged cattle to pasture and keeping them thereon, at a total aggregate sum of not less than two thousand dollars, the details of which libelant will furnish in a supplemental libel, which libelant reserves the right to file herein, making a total loss suffered amount to \$28,450.00 in cash, over and above the present value of the said rescued cattle.

Thirteen. That libelant pleads that its measure of damages is the sum of \$31,500.00 as in article eleven of this libel set out; but if because of libelants efforts to lessen the damages complained of herein, it is compelled to keep the aforesaid two hundred and two live head of cattle now on range at Port Limon, then libelant pleads



that its measure of damages, over and above the value of said cattle, is the sum of twenty-eight thousand, four hundred and fifty dollars (\$28,450.00), as in article twelfth ascertained and specifically set out.

Fourteenth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court, and the said vessel is now lying in the port of New Orleans, within this District.

Wherefore, the premises considered, libelant prays that process in due form of law, according to the course of courts of admiralty, and of this Honorable Court, in cases of admiralty and of admiralty and maritime jurisdiction, may issue against the said  
8 Norwegian Steamship Fort Morgan, its tackle, apparel, furniture, engines, boats and appurtenances of whatsoever description, and that all persons claiming any right title or interest therein may be cited to appear and to answer upon oath all and singular the matters aforesaid, and that this Honorable Court will be pleased to decree in favor of libelant in the sum of thirty one thousand five hundred dollars, for and on account of the loss sustained by libelant as in article Eleventh set out; or, in the alternative, that there be decree in favor of libelant in the sum of Twenty-eight thousand four hundred and fifty dollars losses sustained by libelant as in article twelfth of the libel set out and that libelant may be allowed interest on such judgment as may be awarded him in the premises together with all costs, charges and expenses; and that the said steamship Fort Morgan may be condemned and sold to pay the same; and that libelant may have such other and further general and equit-

able relief and redress in the premises, as in law and justice it may be entitled to receive.

ARMOUR and COMPANY,  
 (Sgd.) By JOHN D. GRACE,  
           Proctor and Attorney.  
 (Sgd.) JOHN D. GRACE,  
           Proctor.

M. A. Grace being first duly sworn doth depose and say that the above named libelant, Armour & Co., is domiciled in the State of Illinois, and has no agent or representative in this District or State, who can appear herein, other than deponent. That deponent has been authorized and requested by libelant to bring this action in  
 9 its behalf. Deponent further says that he has read over the foregoing libel and that the allegations therein contained are true and correct to the best of his knowledge information and belief.

(Sgd.) JOHN D. GRACE,  
 (Sgd.) M. A. GRACE.

Sworn to and subscribed before me this 25th day of January, 1918.

(Sgd.) H. J. CARTER,  
           Clerk.

#### ORDER.

Let admiralty process issue as prayed for. New Orleans, La., January 25, 1918.

(Sgd.) H. J. CARTER,  
           Clerk.

## EXHIBIT—BILL OF LADING.

Filed January 25, 1918.

United Fruit Company Bill of Lading.

Form No. 2110 N for cargo between ports of the Caribbean Sea and West Indies or from such ports to United States ports.

Received at the port of dating hereof by the United Fruit Company (the term Carrier hereinafter used to be taken as including said Company and any substitute or continuing Carrier) from the shipper named on the back hereof, the packages described on the back hereof (hereinafter called the Goods, the Carrier's responsibility in respect of description thereof being limited as hereinafter provided) in apparent good order and condition; to be transported by steamship named on the back hereof (subject as to said steamship to substitution and other liberties as hereinafter provided, the term Vessel hereinafter used to be taken as including said steamship and any substituted or continuing vessel) to the destination named on the back hereof, or as near thereto as the Vessel can safely get, and there delivered in like good order and condition, in manner as hereinafter provided, upon payment of any unpaid freight and other sums payable by shipper, consignee and/or assigns hereunder, to the consignee named on the back hereof, or order if so provided, subject always to the terms of this Contract which are hereby mutually agreed upon as follows:

1. The freight is adjusted in consideration of all the terms and provisions of this contract whether written, printed or stamped.

2. All particulars herein mentioned of the Goods, except only the number of the packages with the marks thereon, are those declared by the shipper, and the same (including anything as to size, weight, quantity, or the like implied by the character of the packages designated) are unknown to the Carrier and shall not constitute, as against the carrier, any part of the carrier's description of the Goods as hereby receipted for, but shall be deemed only representations of the shipper.

3. The Goods, whether perishable or not, are accepted by the Carrier subject to delays or default in shipment, transportation, delivery or otherwise occasioned by war, rebellion, riots, strikes, stoppage of labor, lock-outs or labor troubles of Carrier's employees or others; shortage of labor, fuel, conveyances or room; lack of facilities of any sort; accumulation of cargo; weather or any conditions not shown due to Carrier's fault; and notice to shipper or others of any danger of such delay or default is hereby waived; and the Carrier shall not be responsible for any such delay or default; and if loading of the Goods in the customary manner is delayed, or the Vessel is likely to be detained she may proceed without loading or completing the loading of the Goods.

4. The Carrier's responsibility in respect of the Goods as a carrier shall not attach until the Goods are actually loaded for transportation upon the Vessel, and shall terminate, without notice, as soon as the Goods leave the Vessel's tackles at destination or other place where the Carrier is authorized to make delivery or end its responsibility. Any responsibility of the Carrier in respect of the goods attaching prior to such loading or continuing after leaving the Vessel's tackles as aforesaid, whether the Goods are in course of light-

erage by the Carrier or however else the same may be situated, shall be the same only as that of a warehouseman, without liability on the part of the Carrier, except for want of ordinary care; and all conditions, exemptions, exceptions, and limitations of the liability of the Carrier contained in this contract shall be deemed to apply also to such warehouseman's liability as well as to liability as a carrier. The Carrier may place the Goods in store while awaiting loading, transshipment, forwarding or delivery and thereupon be discharged of all responsibility for loss of or damage to the Goods while so stored.

5. Full freight to destination, whether intended to be prepaid or collected at destination, and all advance charges against the Goods are due and payable to the "United Fruit Company" upon receipt of the Goods by the latter, and the same and any further sums becoming payable to the Carrier hereunder and extra compensation, demurrage, forwarding charges, general average claims, and any payments made and liability incurred by the Carrier in respect of the Goods (not required hereunder to be borne by the Carrier) shall be deemed fully earned and due and payable to the Carrier at any stage, before or after loading, of the service hereunder, without deduction (if unpaid) or refund in whole or in part (if paid), Goods or Vessel lost or not lost, or if the voyage be broken up; and the same shall be payable in United States currency or in New York funds; and the Carrier shall have a lien on the Goods therefor (whether payable in advance or not and though noted hereon as prepaid) surviving delivery, and in case of loss of any part of the Goods shall have a lien on the Goods or any part or proceeds for the whole thereof; and the shipper, consignee and/or assigns

shall be jointly and severally liable therefor, and notwithstanding any lien therefor has been surrendered. Full freight shall be payable on damaged and unsound Goods. The Carrier may collect freight on bill of lading, weight, measurement or quantity, and, if gross weight, measurement or quantity delivered exceeds excess, unless shown to have been caused by absorption of water during the voyage. Any error in freight or other charges or in the classification herein of the Goods is subject to correction, and if on correction the freight or charges are higher, the Carrier may collect the additional amount. Should a package consist of several parcels for more than one person, full freight shall be paid on the parcels for each person as if shipped and consigned as a separate package. If there be an enforced interruption or abandonment of the voyage at a port of distress or elsewhere and the Goods or any part be forwarded, the cost thereof, including extra compensation if performed by vessels in the service of the Carrier, shall be paid by shipper, consignee and/or assigns.

6. The shipper, consignee and/or assigns, shall pay any duty, tax impost, fee or the like for which the Carrier may be charged upon account of the goods, not due to the Carrier's fault, and also any fine or penalty incurred by, the loss or expense occasioned to the Carrier by reason of illegal, incorrect or insufficient documents or marking or numbering of packages or goods, or description of contents or weight or other particulars or by reason of any other act or omission of shipper, consignee and/or assigns.

7. In case of a single article or package exceeding two tons in weight, the true weight thereof shall be de-

clared at time of delivery to the Carrier. If the weight of any package is incorrectly given or no weight is declared of a package exceeding two tons, and in consequence of reliance thereon any loss or damage arises, either to the article or package, or to the Carrier or to others, or if any increased charges or expenses are incurred by the Carrier in handling or caring for any such article or package, the same shall be borne and paid solely by the shipper, consignee and/or assigns.

8. The vessel shall have liberty hereunder, either before or after proceeding to or toward any port of discharge or transshipment, to proceed to or toward, call, enter, or stay at any port or ports, although not upon the usual or any route to, and although in a contrary direction to or beyond the port of discharge or transshipment, once or oftener, backwards or forwards, in any order or rotation, for any purposes whatsoever, though pertaining to another voyage, and the same shall not be deemed a deviation but be deemed within the voyage hereby intended as fully as if specifically described herein; and the vessel shall have liberty also to sail in or out of ports and to proceed with or without pilots; to proceed under sail or in tow; to tow and assist vessels in any situation and to deviate for the purpose of saving life or property; and in case of salvage services rendered to the goods during the voyage by another vessel belonging to or in the service of the same carrier, such services shall be paid for as fully as if the salving vessel belonged to or was in the service of strangers.

9. The Carrier shall have liberty, in its discretion, before or after shipment or loading, to substitute, or ship the whole or any portion of the goods by any other steamship or steamships, although prior or subsequent

and shall have liberty in its discretion, at any port or place, to transship, land and transship or forward the goods, or put into store, craft or other available place and thence transship or forward the same to, or en route to destination, by any vessels, crafts or other conveyances, by land and/or water, subject, if transshipped to a continuing carrier, to the provisions of the usual form of bill of lading of such carrier whether issued or not, and on deck if required by any continuing carrier or the character of any vessel or craft, and upon delivery of the goods into the custody of a continuing carrier, or representative, shall thereupon be relieved of all further responsibility for the goods, and the clean receipt of the continuing carrier, or representative, shall be evidence as against shipper, consignee and/or assigns of delivery of the goods to the continuing carrier in good order and condition. In case of transshipment the carrier may delay forwarding awaiting a vessel or conveyance in its own service or with which it has established connections. Cargo for ports or places in Jamaica other than Kingston, may be transshipped or otherwise treated in accordance with the privileges of this or other articles at Kingston or other Jamaican port, at shipper's risk but ship's expense, lighterage, wharfage and other landing charges at destination to be paid by consignee.

10. If the vessel is prevented by Quarantine from entering or from making due disposition or delivery of the goods, or is detained at Quarantine, the goods may be forthwith, without notice, discharged into lazarettos, craft or other places immediately available, at the risk and expense of shipper, consignee and/or assigns, and such discharge shall be a complete delivery of the goods hereunder and all responsibility of the carrier therefor



as carrier or otherwise, shall end without notice as soon as the goods leave the vessel's tackle and full freight be payable. If, by reason of Quarantine, blockade, war, hostilities, conditions of surf or weather shortage of lighters, riots, or of strikes, lock-outs, stoppage or shortage of labor, of the Carrier's employees or others, or by reason of any of the Excepted Causes mentioned elsewhere in this Bill of Lading; or other conditions existing or threatened at the port of transshipment or discharge of the Goods or elsewhere, the Vessel is, or in the Master's opinion is likely to be prevented or delayed from reaching or from entering, or from making due delivery of the Goods at the port of transshipment or discharge, or delayed at said port or in discharging there beyond the usual time, then either with or without proceeding to or toward or entering or attempting to enter said port, the Goods may be retained on board and discharged on return trip or subsequent voyage, subject to all liberties of this Bill of Lading, or be discharged as convenient for the Vessel at any other port to which the Vessel is bound or may proceed, at risk and expense of shipper, consignee and/or assigns, all responsibilities of the Carrier being ended upon such discharge and full freight together with extra compensation for additional transportation being payable, and at Carrier's option the Goods may be carried on or forwarded to destination from any other port at which so discharged at risk and expense of shipper, consignee and/or assigns, subject in any case hereunder to the provisions in other respects of this Bill of Lading if transportation is performed by the Carrier, or to the usual Bill of Lading of any other carrier performing the same. The Carrier may, in its discretion, in order to secure despatch for the Vessel at port of discharge, or transshipment of the Goods, proceed

thence with the whole or any portion of the goods on board and discharge the same on the return trip or subsequent voyage, or discharge the same at any other port and thence carry or forward the same at Carrier's convenience to destination at Vessel's expense, but risk of shipper, consignee, and/or assigns in either case, subject in other respects to the provisions of this Bill of Lading in case of transportation by the Carrier, or of the usual bill of lading of any other carrier performing the same.

11. The Carrier shall not be liable, as carrier or otherwise, for any loss, damage, delay or default, whether occurring during transit or before, or after or during or while awaiting loading, transshipment, discharge, delivery or other disposition of the Goods, or on board or in lighters or craft, or on wharf or in warehouse, at any port or place, occasioned by any of the following Excepted Causes, throughout this Contract always excepted: By causes beyond the Carrier's reasonable control; by dangers or accidents of the sea or other waters or canals and of navigation or transportation of whatsoever nature or kind; by fire or explosion from any cause wheresoever occurring; by barratry, theft or embezzlement of master or crew; by act of God; by enemies, pirates, robbers or thieves; by arrest or restraint of Governments, princes, rulers or peoples, by prolongation of the voyage; by legal process or stoppage in transit; by fumigation or other treatment required by Quarantine or sanitary authorities; by pestilence, riots, wars, rebellions; by strikes or stoppage of labor, or labor troubles, of Carrier's employees or others; by explosion or bursting of boilers, damage from steam, breakage of shafts, accidents to or from machinery or breakage

or derangement thereof; by any latent or other defect in hull, machinery or appurtenances of the Vessel or any craft or unseaworthiness thereof, although existing at time of shipment or transshipment or at the beginning of the voyage, provided due diligence shall have been exercised in making the same seaworthy; by collision, grounding or stranding; by heating, heat of holds, or effects of climate; by ice, earthquake, sea water, wetting rain, or spray, frost, decay, putrefaction, ferment, rust, stains, sweat, floods or freshets; by giving away, falling or destruction of wharf, shed or warehouse; by damage incident to transportation; by change of character, loss of weight or contents, drainage, leakage, breakage, shrinkage or wastage; by cooperage or mending; by vermin or rat damage; by stowage or contact with, or smell, evaporation, leakage, escape of contents or taint from other goods, the Vessel being privileged to carry any other articles, whether hazardous or not, and live stock, as cargo or otherwise, on and/or under deck; by nature of the goods or cargo, or insufficiency of packages; by explosion of any cargo, whether shipped with or without disclosure of its nature or condition, by obliteration, error, insufficiency or absence of marks numbers, address or description; by land damage, risk of craft, hulk or transshipment; by faults or errors in navigation or management of the Vessel, provided due diligence shall have been exercised to make the Vessel in all respects seaworthy and properly manned, equipped and supplied; by any act or omission of shipper or owner of the Goods, or of his agent or representative. Flour, meal, corn, rice and other foodstuffs in sacks, being subject to minor loss of contents notwithstanding due care, it is mutually agreed that to the extent of one twentieth of the original weight loss of contents of

any such package shall be deemed without Carrier's fault, and the Carrier shall not be responsible therefor.

12. The shipper shall be liable for and bear any loss or damage to the Carrier or to others caused by inflammable, explosive, noxious, hazardous or dangerous goods or articles shipped without full disclosure of their nature at the time of lading and entering hereon, whether shipper be principal or agent, or aware of the nature of the goods or articles or not; and such goods or articles may be thrown overboard or destroyed at any time by the Carrier without compensation to any person; and extra charges and expenses, if any, for discharging, lightering, handling or caring for, or otherwise occasioned by such goods or articles, or those declared or considered noxious or hazardous by the civil or military authorities of any port, shall be borne by the shipper, consignee and/or assigns. Goods or articles of such character may be carried on deck, as well as any others whose nature or bulk requires them to be so carried and the same shall be at the risk of the owner thereof of all loss or damage thereto occurring while so situated not shown due to the Carrier's fault.

13. General Average shall be payable according to York-Antwerp Rules of 1890, and as to matters not herein provided for according to the law and usage at the port of New York. If the ship owner shall have exercised due diligence to make the vessel in all respects seaworthy and to have her properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from fault or error in navigation or in the management of the Vessel or from any latent or other defect in the Vessel, her machinery and ap-

purtenances, or from unseaworthiness, although existing at time of shipment, or at the beginning of the voyage (provided the defect or unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo and shall contribute with the ship owners in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

14. This shipment is subject to all the terms and provisions of the Act of Congress of the United States, approved February 13th, 1893, entitled "An Act relating to the navigation of vessels," etc., and of Sections 4282 to 4287, each inclusive, of the United States Revised Statutes. The Carrier shall not be liable for gold or other precious metals, precious stones, bills, notes or securities, documents, pictures, glass, china, silk furs, lace or any of the articles enumerated in Section 4281 of the United States Revised Statutes, except in accordance with such statute, and after written notice of the character and value thereof at the time of loading and entry thereof.

15. The Carrier shall not be responsible for specie, bullion, jewelry, plate, precious stones or metals, bank notes, bonds or other negotiable documents or valuables until actually delivered on board the Vessel to the Master or other officer in charge of the deck at the time and signed for by him. Delivery must be taken on the Vessel's deck at port of discharge, and the Carrier's responsibility shall thereupon cease. Such articles are

received and the rate of freight has been specially adjusted upon the condition and understanding that the value thereof has been insured by the shipper or others for account of the Carrier in respect of its liability, under usual form of Lloyds Policy or equivalent, and that the shipper by accepting this bill of lading represents that such insurance has been effected, and undertakes that the policy shall be available for the Carrier's protection in case of need.

16. The Carrier does not undertake that the Vessel is equipped with refrigerated or specially cooled or ventilated compartments or otherwise equipped for transportation of goods or articles of a perishable nature, nor whether so equipped or not, to transport such or any other goods or articles in any such compartment or otherwise than as ordinary cargo, and shall not be liable for any loss or damage from failure so to do, unless such transportation is expressly stipulated for herein. Fresh fruits, vegetables and meats and any goods or articles of a perishable nature, however, carried are received and carried at the sole risk of the owner thereof. The Carrier shall not be responsible for any loss or damage to such goods or articles from temperature or atmospheric conditions, risks of refrigeration, cooling, or ventilation, accident to, or latent or other defect in, or explosion, breakage, derangement, insufficiency, shortage or failure in any respect or unseaworthiness of, or in respect of any refrigerator or refrigerated or specially cooled or ventilated compartment or plant, or apparatus, boiler, engine, machinery, appliances, materials or supplies therefor, or any part thereof, although existing at time of shipment or transshipment, or at the beginning of the voyage, provided due diligence shall have

been exercised to make the Vessel seaworthy; and if any such goods or articles shall at any stage be, or in the opinion of the master or Carrier's representative be decayed, injurious or offensive, the same may be thrown overboard or destroyed, without notice, before or after arrival, and the Carrier shall not be responsible therefor. The Carrier may discharge any such goods or articles or other cargo, without notice, immediately the Vessel is ready, notwithstanding danger to such goods or articles from freezing or other weather conditions, and all such goods or articles are received subject to the risk of such discharge, and if delivery thereof is not taken, without notice from the Vessel's tackles, or, at Vessel's option, from the wharf as soon as available after landing, the same may be left on wharf or other convenient place at risk of shipper, consignee and/or assigns. The provisions of this Article are in addition to and not in substitution for the other provisions of this bill of lading, and all goods of such nature as mentioned herein or to be carried in refrigerated or specially cooled or ventilated compartment are received and are subject also to all other terms, conditions, exceptions and limitations as to liability contained in this bill of lading.

17. The Vessel may commence discharging upon arrival immediately she is ready, without notice, at any hour of day or night, and discharge with or without intermission, at wharf, in stream or elsewhere, at Carrier's convenience, any custom of the port to the contrary notwithstanding, except that in United States ports delivery need be taken only during usual working hours, and the Collector of the Port is hereby authorized to grant an order for the discharge of the cargo immediately after entry of the vessel. Whether the vessel be

discharged at wharf or in stream or elsewhere, the goods may, without notice, be in whole or part discharged over side into lighters or other craft at risk and expense of shipper, consignee and/or assigns from the time the goods leave the vessel's tackles, the carrier being hereby authorized to employ or appoint lightermen, contractors and/or others, without responsibility of the Carrier for the character or condition of any craft, for account of shipper, consignee and/or assigns, notwithstanding the latter are at hand with their own craft. Delivery of the goods shall be received without notice from the vessel's tackles as the goods come to hand in unloading, or as soon as available if discharged on Carrier's wharf. If not so received, the master or agent of the vessel is hereby authorized at the risk and expense and for account of the shipper, consignee and/or assigns, without notice, to enter and discharge the goods, depositing them in hulk or craft or in or upon wharf, warehouse, Public Stores or Custom House, or permitting them to lie where landed, or making such disposition thereof as the authorities of the port may direct subject at all times to any lien of the Carrier, including storage charges by the Carrier, and to that end to employ such lightermen, truckmen, warehousemen, wharfingers or other agencies as may be requisite, customary or proper, who shall be deemed the agents solely of shipper, consignee and/or assigns and not of the Carrier, the latter being hereby relieved of all responsibility for or in respect of the goods, without notice to any person whatsoever, as soon as the same leave the Vessel's tackles; but nothing herein contained shall be deemed to limit the right of the Carrier as above provided, to appoint lightermen and others notwithstanding consignee or others are at hand with their own craft. If the shipper



consignees or assigns entitled to the goods shall not within 48 hours after unloading without notice, pay the freight and all other sums payable to the Carrier by shipper, consignee and/or assigns and relieve the Carrier from all further responsibility and expense for storage charges or otherwise in respect to the goods, the Carrier is hereby authorized at any time on 48 hours notice by mail to consignee or assigns or other person named for notice in the bill of lading, or if such consignee or assigns or other person is unknown or cannot be found in port, then, without notice, to sell the goods and retain and pay from the proceeds the expenses hereunder, and all sums due the Carrier in respect of the goods from shipper, consignee and/or assigns and all other charges on the goods, and the Carrier shall upon sale be discharged of all liability in respect of the goods except to account for the proceeds. Goods consigned to New York may be delivered in Brooklyn, Jersey City, Hoboken, Weehawken or elsewhere in the Port of New York at Carrier's convenience.

18. The Carrier shall not owe any duty to notify consignee or others of the arrival or disposition of the goods nor be liable for any loss or damage arising from not doing so, except where otherwise expressly required herein. If the consignment herein be to order with provision for notice to a person named, notice to such person shall be required only when notice to a named consignee would be required hereunder.

19. If the goods are landed on a Government wharf to be taken charge of, handled or moved by any concessionaire or Government agent or nominee or for the performance of any duty in respect thereof by the cus-

toms or other authorities, or delivered into the custody of such authorities or others, any responsibility of the Carrier shall be ended, without notice to the consignee, authorities, wharfingers, concessionaires or others, as soon as the goods are so landed or delivered; and the goods shall be deemed thereupon in the sole custody of the wharfingers and/or of such concessionaire, agent or nominee and the customs and other authorities who shall be deemed the agents solely of the consignee or other person entitled to the goods; but the goods shall continue subject to any lien of the Carrier.

20. The goods shall be subject to charges for mending and repair of packages, which shall be a lien thereon and paid by shipper, consignee and/or assigns; sweepings, if any, and unclaimed goods not otherwise accounted for, shall at Carrier's option be apportioned to the different consignees of like goods according to the shortages and be accepted as good delivery to the extent thereof; and if any consignee has a shortage in marks or numbers called for herein, unclaimed goods of like kind but of different marks or numbers shall, at Carrier's option, be deemed to constitute a part of the goods and be accepted by consignee and/or assigns as good delivery hereunder.

21. Unless a higher value be stated herein, the value of the goods does not exceed \$100.00 per package, nor \$8.00 per cubic foot, and the freight thereon has been adjusted on such valuation, and no oral declaration or agreement shall be evidence of a different valuation. In computing any liability of the Carrier in respect of the goods, no value shall be placed thereon higher than the invoice cost (including freight prepaid hereunder) not exceeding \$100.00 per package nor \$8.00 per cubic

foot (or such other value as may be stated herein), nor shall the Carrier be held liable for any profits or increase of price or value over such cost not exceeding said value, nor for any special or consequential damage and the Carrier shall always have the option of replacing any lost or damaged goods.

22. If there is opportunity to discover by examination, before removal of the goods, that loss of contents or shortage of, or damage to the goods exists or may exist the Carrier or Vessel shall not be liable for any such loss, shortage or damage, unless notice of claim therefor be presented in writing to the Carrier or to the master or agent of the Vessel before removal of the goods. If there is no opportunity to discover before removal, that such loss, shortage or damage exists or may exist, then the Carrier or Vessel shall not be liable therefor unless such notice of claim be so presented within 48 hours after removal of the goods. The Carrier or Vessel shall not, in any event, be liable for any claim or demand arising hereunder or in respect of the goods, unless notice of the claim be presented in writing to the Carrier within thirty days after delivery of the goods to the Carrier, nor unless suit therefor is commenced within six months after delivery of the goods to the Carrier, and the lapse of such period shall be deemed a complete bar to recovery in any such suit or proceeding not sooner commenced, notwithstanding the Carrier may be a non-resident or a foreign corporation. Nothing shall be deemed a waiver of the provisions of this article except a written express waiver signed by the Carrier.

23. In case of any loss or damage for which the Carrier shall be liable, the Carrier shall to, the extent of

such liability have the full benefit of any insurance that may have been effected upon the goods or against said loss or damage, and as well also of any payment to insured by underwriters repayable only out of recovery against the Carrier, notwithstanding the underwriters were not obligated to make such payment.

24. Whether so stated or not, if this bill of lading is issued against lighter, warehouse or shipping receipt or another bill of lading or any similar document, the issuer of such document shall be deemed a prior carrier or custodian of the goods, subject to the provisions of such document, and the Carrier issuing this contract shall not be responsible for the goods until actually delivered into its custody. If the vessel, for Carrier's convenience or otherwise, loads in whole or part in stream or elsewhere than alongside where the goods are received for shipment, the goods may be transferred to the vessel at risk and expense of shipper, consignee and/or assigns until loaded on the vessel, the Carrier being authorized to employ or appoint transfer agents and/or others therefor to be deemed the agents solely of shipper, consignee and/or assigns. The goods may be transported at any stage by lighter or craft, either in course of loading, transshipment or delivery, or en route to destination or otherwise. All such transportation, whether at Carrier's expense or not, shall be at risk of shipper, consignee and/or assigns, subject in other respects to the provisions of this bill of lading, and if entrusted by the carrier to others shall be deemed to be by connecting carriers subject to their usual contract without responsibility of the Carrier in respect thereof.

25. Unless special care in consideration of increased freight has been arranged for and is provided for herein, all cargo is subject to stowage in holds and handling in quantities along with other cargo in any customary manner required for usual despatch, and to such stowage as available when the cargo is received or as the nature of the other cargo permits, and to contract with other cargo, working and pressure and the like, and the rate of freight is adjusted with reference to such handling and stowage only. All cargo liable to loss or injury by breakage, contact with other cargo or in any other manner under such conditions, should be so wrapped, cased or packed as adequately to protect the same therefrom; and the carrier shall not be answerable for any loss or injury to foodstuffs or other loose materials in single bags, liquids in glass or tins, glass, unwrapped bales of skins or of other cargo, unprotected cargo of any sort or to any cargo when such loss or injury would not have been received if the cargo had been so protected, and shipper, consignee and/or assigns of any cargo not so protected shall be answerable for and bear any loss or damage to the Carrier or others arising therefrom. Live birds or animals and livestock are received at sole risk of shipper, consignee and/or assigns the Vessel not having any special equipment therefor, and are subject in other respects to the provisions of the bill of lading, and to be deemed included in the term "Goods."

104½

## LIBELANT'S EXHIBIT A-1.

## United Fruit Company.

26. This Bill of Lading, duly indorsed, shall if required, be given up to the Carrier in exchange for a delivery order.

27. This Bill of Lading shall be construed and the rights of the parties thereunder determined according to the law of the Commonwealth of Massachusetts subject to any laws of the United States inconsistent therewith.

28. The shipper, vessel, consignee, destination and goods referred to overpage as mentioned or described on this side (back) hereof are as follows:

Shipper—Armour & Company.

Destination of the goods—Jacksonville, Fla.

Vessel "Fort Morgan". Expected to sail .....

With privilege to substitute, transship and other privileges as hereinbefore provided.

Consignee Order of—Armour & Company, or assigns.

Notify (if consigned to Shipper's Order) .....

## Shipper's Description of Goods.

(Carrier's responsibility for description being limited as hereinbefore provided).

Marks—None. Numbers. Quantities—500. Class and Contents of Packages—(Five Hundred) Head Live Steers (More or less). Shipper's Measurement—Shipper's Weight—Rate—Steamship Freight.

Freight prepaid as per contract subject to Live Stock Agreement.

(Wherever United Fruit Company appears, read: The Central American Cattle Co., Inc.)

(Copy not negotiable).

80 not shipped.

(Signed) THO. JOHANNESSEN,  
Master.

It is mutually agreed that, in addition to the other terms and conditions of the bill of lading, which shall be deemed affected only in so far as inconsistent herewith, this shipment is at the sole risk of the owners thereof, of all risks of war, arrest, restraint, capture, seizure, destruction, detention, sinking, interference or hostilities on the part of any power and of all consequences thereof; and the vessel shall have liberty in the discretion of the master, owner or any agent or charterer, thereof to proceed notwithstanding any such risks and armed or unarmed, also, if deemed advisable in the judgment of such master, owner or agent or charterer, in order to avoid loss, damage, delay, expense, or other disadvantage or danger to vessel, cargo, passengers or other interest, to wait at the port of shipment or elsewhere, and/or, either with or without proceeding to or toward the port of discharge or entering or attempting to enter or discharge the goods there and whether such proceeding, entry or discharge be permitted or not, to proceed to or toward any other port or ports in or not in any route to destination and/or return to the port of shipment once or oftener backwards or forwards in or not in any order or rotation, retaining the goods on board or discharging the same at risk and expense of the owners thereof at port of shipment or elsewhere at

the first or any subsequent call, and shall thereupon be relieved of all responsibility in respect thereof, and full bill of lading freight, extra compensation for any additional service and any extra expense occasioned thereby shall be paid by shipper, consignee and/or assigns, and shall constitute a lien on the goods; and the vessel is privileged to carry any cargo, not excepting contraband; and the vessel shall have liberty in any circumstances to comply with any orders or requests of the Government of the United States or of Great Britain, its allies or any insurance or other department or bureau or agency thereof or of any person purporting to act with the authority of any such government or department bureau or agency.

29. And finally that in accepting this bill of lading the shipper, owner and consignee of the goods and holder of this bill of lading agree to be bound by all its provisions, on this page and overpage, whether written, printed or stamped, as fully as if signed by all of them.

In witness whereof, the United Fruit Company,, by its agent has signed ..... Bills of Lading exclusive of non-negotiable copies, all of the same tenor and date, one of which being accomplished the others to stand void.

Dated at Limon C. R., Nov. 28, 1917.

No. ....

(Signed) THE CENTRAL AMERICAN  
CATTLE CO., INC.,

By THO. JOHANNESSEN,  
Master S/S "Fort Morgan."



Total Steamship Freight .....
Advance Charges .....
Consular Fees .....
Certifying Bill of Lading .....
Translation .....
Insurance .....
Total U. S. Currency .....

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11                      STIPULATION FOR COSTS.

Filed October 19, 1918.

District Court of the United States, for the Eastern  
District of Louisiana.

Whereas, a libel was filed in this Court on the Twenty-Fifth day of January, 1918, by Armour & Co. against the Steamship "Fort Morgan," her tackle, apparel etc., for the reasons and causes in the said libel mentioned; and praying that process may issue against said steamship, her tackle, apparel, etc., and the said libelant and surety, parties hereto, hereby consenting and agreeing, that in case of default or contumacy on the part of the libelant or its surety execution may issue against their goods, chattels and lands for the sum of Two Hundred and Fifty Dollars.

Now, therefore, it is hereby stipulated and agreed for the benefit of whom it may concern, that the libelant herein and the stipulator undersigned, shall be, and each of them is hereby, bound in the sum of Two Hundred and Fifty Dollars, conditioned that the libelant

above named shall pay all costs and expenses which shall be awarded against it by the final decree of this Court, or upon appeal by the Appellate Court.

ARMOUR AND COMPANY,  
(Signed) By JOHN D. GRACE, Atty.

Taken and acknowledged this 25 day of January, 1918, before me.

(Signed) W. C. DOUGLASS.

Eastern District of Louisiana, ss:

The above Stipulator being duly sworn, deposes and says that he resides in this City, and that he is worth the sum of Two Hundred and Fifty Dollars, over and above all his debts and liabilities.

(Signed) W. C. DOUGLASS.

Sworn to before me this 25th day of January, 1918.

(Signed) FRANK WM. HART,  
(Seal) Not. Pub.

12 ADMIRALTY WARRANT ISSUED JANU-  
ARY 25TH, 1918.

The President of the United States of America.

To the Marshal of the Eastern District of Louisiana, or  
to his lawful Deputy—Greeting:

You are hereby commanded to seize, and into your possession take, the Norwegian Steamship "Fort Mor-

gan," its tackle, apparel, furniture, engines, boats and appurtenances of whatsoever description now libeled by Armour and Company, for the cause set forth in the Libel now pending in The District Court of the United States for the Eastern District of Louisiana (New Orleans Division), that you do cite and admonish the owner, or owners, and all and every other person, or persons, having, or pretending to have, any right, title, or interest in or to the same, to be and appear before a District Court of the United States for the District aforesaid, to be holden at the City of New Orleans, on the 18th day of February, A. D. 1918, to show cause, if any there have or can why the said Norwegian Steamship "Fort Morgan," its tackle, apparel, furniture, engines, boats and appurtenances of whatsoever description, should not be condemned and sold agreeably to the prayer of Libellant; and how you have executed this warrant that you make return according to law.

Witness, the Honorable Rufus E. Foster, Judge of said Court, at New Orleans, this 25th day of January, 1918, and the 142nd, year of the Independence of the United States.

(Signed) H. J. CARTER, Clerk.

By .....  
Deputy Clerk.

Clerk's Office:

A true copy.

(Signed) H. J. CARTER,

(Seal)

Clerk.

New Orleans, La., January 25, 1918.

Received by U. S. Marshal. New Orleans, La., January 25th, 1918, and on the same day, month and year I seized and took into my Custody the Steamship Fort Morgan as she lay in the Mississippi River and served the Original of which this is a certified copy on Celvist Tuonrill in person whom I found in charge at time of said seizure in New Orleans, La.

(Signed) FRANK M. MILLER,  
U. S. Marshal.

(Signed) By D. A. SANDERS,  
U. S. Marshal.

Car fare 20c.

13

CLAIM.

Filed February 4th, 1918.

United States District Court, Eastern District of  
Louisiana, New Orleans Division.  
Armour & Company,

vs. In Admiralty No. 15811.

Steamship Fort Morgan.

And now Adolf Anderson intervening for the interest of Fort Morgan Steam Ship Company, Limited, domiciled and doing business at Kingdom of Norway, appears before the Court and makes claim to the Steamship Fort Morgan, her boats, machinery, tackle, apparel, and furniture, as the same are attached by the Marshal

under process of this Court at the instance of Armour & Co. and P. G. Janseen and the said Adolf Andersen avers that, he was in possession for said Fort Morgan S. S. Co., Ltd., of said Steamship Fort Morgan, her boats, machinery, tackle, apparel and furniture at the time of the attachment hereof, and said Fort Morgan Steam Ship Company, Limited, is the true and bona fide owner of said Steamship Fort Morgan, her boats, machinery, tackle, apparel, and furniture, and that no other person is the owner thereof and that the said Adolph Andersen is the Master of said Steamship, and the true and lawful bailee thereof for the said owner.

Wherefore, he prays to be admitted to defend accordingly, and that the Honorable Court will be pleased to decree a restitution of said property to him, and otherwise right and justice to administer in the premises.

(Signed) ADOLF ANDERSEN,  
Master S. S. "Fort Morgan."

Adolf Andersen being duly sworn, deposes and says that all the allegations of the foregoing claim are true and correct.

(Signed) ADOLF ANDERSEN.

Sworn to and subscribed before me at New Orleans, Louisiana, on this, the 4th day of February, A. D. 1918.

(Signed) HY. J. LOISEL,  
(Seal) Deputy Clerk U. S. District  
Court.

## RELEASE BOND.

Filed Feby. 4th, 1918.

United States of America,  
Eastern District of Louisiana:

Know all men by these presents, that we, Fort Morgan Steam Ship Company, Limited, a corporation, organized under the Laws of the Kingdom of Norway, as principal, and American Surety Company of New York, as surety, are held and firmly bound unto Frank M. Miller, United States Marshal, for the benefit of whom it may concern, in the sum of Forty Thousand (\$40,000.00), dollars lawful money of the United States of America, for the payment whereof to the said Frank M. Miller, United States Marshal, for the benefit of whom it may concern, his successor and successors, we jointly and severally bind ourselves, our heirs, executors, and administrators firmly by these presents.

Witness our respective names and seals, hereunto affixed by us at the city of New Orleans, this .... day of February, A. D. 1918.

Whereas, an admiralty warrant was lately issued out of the Honorable the District Court of the United States of America for the Eastern District of Louisiana, at the suit of Armour & Company, vs. Steamship "Fort Morgan," her tackle, apparel, and furniture, and numbered 15811 on the docket of said Court, commanding the Marshal to seize and take into his possession the said Steamship, its tackle, apparel, furniture, engines, boats and appurtenances, which has been seized accordingly, but has been released from said seizure and de-

livered to the Master and lawful bailee for said principal, Owner thereof, by reason of the signing, sealing, and delivery of these presents, said claimant having filed a claim thereto, which is now of record in the Clerk's Office of this Court.

Now, the condition of the above obligation is such, that if said claimant and surety abide by all the orders, interlocutory or final, of the Court, and pay the said libelant the amount awarded by the final decree, rendered in the Court to which the process is returnable, or in any Appellate Court, then the foregoing obligation is to be void; but otherwise shall remain in full force and virtue.

**FORT MORGAN STEAMSHIP  
CO., LTD.,**

(Signed) By ADOLF ANDERSEN, Master.

**AMERICAN SURETY COMPANY  
OF NEW YORK,**

(Signed) By PETER F. PESCU,   
Resident Vice-President.

Attest:

(Signed) CHAS. HOFFMANN,   
(Seal) Resident Assistant Secretary.

....., Surety on the above bond, being duly sworn, says that ..... he resides in the city of New Orleans, Louisiana, and ..... is worth the sum of ..... (\$.....) dollars over and above all ..... just debts and liabilities.

.....  
.....

Sworn to and subscribed before me on this ..... day  
of ....., A. D. 192....

This bond is approved for the sum of .....  
(\$.....) dollars.

15                      John D. and M. A. Grace,  
  Lawyers.  
  712-713 Canal Bank Building.  
  New Orleans, La.

Hon. Victor Leovy,    Feby. 2/18  
Proctor for S/S Fort Morgan.

Dear Mr. Leovy:

Confirming my verbal advise say that libelant will be  
satisfied with a release bond in the sum of Forty Thou-  
sand Dollars (\$40,000.00) in Armour & Company, S/S  
Fort Morgan, U. S. Dist. Ct., E. D. La., No. Div.

Yours truly,

(Signed)                      JOHN D. GRACE.

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16                      EXCEPTIONS TO LIBEL

February 15, 1918.

United States District Court, Eastern District of  
Louisiana.

Armour & Company ,  
vs. No. 15,811, In Admiralty.  
Steamship Fort Morgan.

Now into Court comes the Fort Morgan Steamship  
Company, Limited, claimant herein, and without answer-



ing the libel of Armour & Company, but reserving its right to answer thereto if this exception should be overruled, excepts thereto, and for cause of exception says that said libel is too vague and indefinite for exceptor intelligently or safely to prepare its responsive pleadings or its defense thereto. And in specification of said exception, said exceptor says:

First: That said libel avers in Article Thirteenth that various expenses were sustained amounting in all to two thousand dollars, the details of which libellant, without reasons stated, refrains from giving, but says that it will give in a supplemental libel, which supplemental libel has not yet been filed; that said libel should state, but does not state, the details of said claim, setting forth each item fully and separately.

Second: That said libel avers that the value of each of the cattle laden on board was seventy-five dollars, including freight, which it avers to have been paid. Exceptor says that this averment is a manifest attempt to claim shipping value plus repayment of freight, and exceptor shows that said libel annexed thereto as part thereof a bill of lading purporting to be signed on behalf of the Central-American Cattle Company, Incorporated, which contains upon its face the words "Freight prepaid as per contract subject to Live Stock Agreement." Exceptor says that it would appear from this indorsement that the libellant and the Central-American Cattle Company had mixed the matter of shipment and freight with some sort of agreement between themselves, and that it is proper that said libel should (but it does not) set out said alleged agreement or annex a copy thereof and state specifically to whom said freight is averred to have been paid, and when, and the amount thereof.

Wherefore, exceptor prays that after all proper proceedings, this exception may be maintained, and the said libel dismissed; and in the event that it be overruled that exceptor have leave and time to answer or plead as it may be advised; and for any other or further order or decree that may be proper in the premises, and for costs and general relief.

(Signed)      DENEGRE, LEOVY & CHAFFE.  
Proctors for Exceptor.

I hereby certify that I am Proctor for the Fort Morgan Steamship Company, Limited, filing the foregoing exceptions, and that the allegations therein contained are true and that the same is in my opinion well-founded in law, and is not interposed for delay.

(Signed)      VICTOR LEOVY.

Sworn to and subscribed before me at New Orleans, Louisiana, this February 15th, 1918.

(Signed)      FELIX J. PUGH,  
(Seal)      Notary Public.

18        HEARING AND ORDER MAINTAINING  
             EXCEPTIONS WITH LEAVE TO FILE  
             SUPPLEMENTAL LIBEL IN 10 DAYS.

Extract from the Minutes.

February Term, 1918.

New Orleans, Saturday, March 23rd, 1918.

Court met pursuant to adjournment.

Present: Hon. Rufus E. Foster, Judge.

Armour & Company,

vs.

No. 15,811.

Steamship "Fort Morgan."

This cause came on this day to be heard upon the exceptions filed by the claimant to the libel herein;

Present:

Victor Leovy, proctor for claimant, exceptor;

John D. Grace, proctor for libelant;

and was argued by the proctors for the respective parties;

Whereupon, and on due consideration thereof, it is ordered by the Court that the said exceptions herein be, and the same are hereby, maintained, with leave to the libelant to file a supplemental libel within 10 days herein.

## SUPPLEMENTAL LIBEL.

Filed May 17, 1918.

United States District Court, Eastern District of  
Louisiana.

Armour & Company,

vs. No. 15811, In Admiralty.

Steamship Fort Morgan.

Now into Court comes Armour & Company and exhibit this their supplemental libel in the above entitled and numbered cause; and thereupon articulately propounds as follows:

First. That the details referred to in the original libel filed in this cause, which said libel avers would be set out in a supplemental libel, are set out in the three sheets, which are hereto annexed and are hereby made a part hereof as if set out at large herein; and for purpose of identification herewith, are marked, respectively, "Exhibit 1," "Exhibit 2" and "Exhibit 3."

Second. That the Live Stock Contract referred to on the Bill of Lading attached to the libel, as a part thereof, is as per "Exhibit D," which is hereto attached and hereby made a part hereof.

Third. That the rate of ocean freight agreed upon was \$25.00 per head for each beef steer weighing eight hundred (800) pounds and upwards. The freight was paid to the Central American Cattle Company, Incorporated, in whose service the said Steamship Fort Mor-

gan was employed, at the time of the loading of said cattle, and paid at date subsequent to the date when the Central American Cattle Company delivered to libelants the Bill of Lading for the said cattle signed by the master of said steamship.

Fourth. That all and singular the premises are true and within the Admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, the premises considered, libelants file this supplemental libel in compliance with the order of the Court, and prays that after due proceeding had that there be judgment in favor of the libelants in the sum of \$31,500.00 for and on account of the losses sustained by libelants as in article eleventh of the original libel set out; or, in the alternative, that there be a decree in favor of libelants in the sum of \$28,450.00, the losses sustained by libelants as in article twelfth of the libel set out, plus the further and additional expenses accruing from month to month, incurred in respect to the pasturing and caring for said cattle, of the nature set out in "Exhibit C" hereto attached; and that such expenses be allowed down to the date of the decree to be rendered in this cause; and libelants pray for all other general and equitable relief as in the original libel prayed for.

ARMOUR & COMPANY,  
(Sgd.) By JOHN D. GRACE.

(Sgd.) JOHN D. GRACE,  
Proctor.

John D. Grace being first duly sworn, doth depose and say that he is the duly authorized attorney and in fact for the libelants herein within this district, with respect to the matters herein referred to, and that all and singular the matters aforesaid are true and correct to the best of Deponent's knowledge, information and belief.

(Sgd.) JOHN D. GRACE.

Sworn to and subscribed before me this 15th day of May, 1918.

(Sgd.) H. J. CARTER,  
(Seal) Clerk, U. S. District Court.

21

"EXHIBIT A."

Lyon Hermanos (Lloyd's Agent) Account Steamship  
Fort Morgan.

Costa Rican Currency.

1917

Dec. 1	Proportion of Salary J. H. Wilson, Nov. 28th to 30th	30.72
	Proportion of Salary R. Reo, Nov. 28th to 30th ....	13.77
	Railway freight on cattle ..	847.05
	Handling dead cattle on wharf	4.25
Dec. 3	Board for cowboys .....	13.40
Dec. 10	Pasturage paid Victor Pacheco on 210 Head Cattle	94.50
	Amount paid autorides de Higbiene for certificate re dead cattle .....	25.00

	Amount paid Juan E. Ramagosa for certificate re accident on board Fort Morgan .....	140.00	
Dec. 12	Auto Service in Limon December 7th and 12th ....	28.75	
	Wharf charges as per bill attached .....	31.15	
	Wharf charges as per bill attached .....	220.00	
	Building Cattle Chute .....	5.00	
	Loading cattle, salt, etc. ..	53.00	
	Attending salvaged cattle ..	4.00	
Dec. 14	One-half clearance charges Fort Morgan .....	3.00	
Dec. 19	Care of stock, repairing pasture fences, saving Hides Railway transportation M. Rios for a/c cattle .....	345.40	
		7.80	
Dec. 20	Receiving cattle ashore from Fort Morgan .....	62.40	
	Discharging live cattle at pier and dead cattle at sea ...	279.10	
	Proportion of salaries Foreman and Timekeeper ....	33.25	
	Bill Viriato Espinach, loading cattle .....	61.00	
	Expenses J. H. Wilson, Supt. Santa Clara .....	2.60	2305.14
	Cr:		
	Hide and tallow sold .....		278.00
			<hr/>
	Balance .....		2027.14
Jan. 1	Balance due C 2027.14 in U. S. Currency \$405.43.		

## "EXHIBIT B."

Lyon Hermanos (Lloyd's Agent) Account Steamship  
Fort Morgan.

Amounts Due in U. S. Currency.

1917.

Dec. 1	Use of Steam Crane on Wharf	25.00
Dec. 1	British Consul Fees Ft. Morgan .....	6.68
Dec. 1	Amt. paid American Consul for Authentication of signatures and certifying documents re Ft. Morgan ...	25.00
	Amt. paid Capts. F. Heckman and Y. Sorensen for attending Survey .....	60.00
Dec. 1	Supt'ce Pay roll Santa Clara	
Dec. 1	Pilotage bill .....	21.00
Dec. 1	Wharf charges per bill ....	80.78
Dec. 1	Wharf charges per bill ....	51.50
Dec. 1	Prop'n Capt. Heckman's salary supervising discharging, etc. ....	32.00
Dec. 1	Prop'n Capt. & Sorensen's salary supervising discharging, etc. ....	45.00
Dec. 1	Arsenic .....	.77
Dec. 1	Special train limon to Guapiles, Dec. ....	35.00
Dec. 1	Fumigating S/S Fort Morgan .....	25.00
Dec. 1	Supt'ce Pay roll Santa Clara	
	Dec. 1, 1917 .....	20.05



Dec. 1	Pasturage on Cattle (Dec. at 70c. per head per month	135.71	
	1 Gallon Carboline .....	1.20	
	30 lb. Salt .....	.53	
1918.			
Jan. 11	Attendance to cattle .....	11.68	
	60 lb. Salt .....	1.06	
	Salvaging 1 hide .....	.40	
	Pasturage to Jan. 11, 1918	49.92	
			646.42
	Cr:		
	Value of 1 hide sold .....	418.00	
	Value of 5 lb. Tallow sold ..	.33	4.50
Jan. 11	Balance in U. S. Currency ..		\$641.91

## 23 "EXHIBIT C."

## U. S. Currency.

January, 1918	Pasturage and Supplies for cattle .....	\$151.17
February, 1918	Pasturage and Supplies for cattle .....	164.52
	Total .....	\$315.69

Pasturage and supplies for cattle for each succeeding month, estimated on basis of average for Jan. and Feb. .... 157.84

## Costa Rican Currency.

January 21	Pay Roll, care cattle first quincena .....	59.25
January 24	Merchandise .....	4.95
January 28	Board Sanitary Inspector Limon .....	25.15
February 2	Expense account Supt. Wilson ....	8.95
February 2	Pay Roll, care cattle, etc., 2nd quincena .....	96.85
March 2	Pay Roll, care cattle, etc., 2nd quincena .....	217.35

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24

## EXHIBIT D—LIVE STOCK CONTRACT.

Filed May 17, 1918.

The Central American Cattle Co., Inc.

## Live Stock Contract.

Memorandum of Agreement, made this Twenty-ninth day of November, 1917, between Central American Cattle Co., Inc., of the first part, and Armour & Company of the second part, viz: The said party of the first part hereby agrees to furnish room on the deck and in the holds of the steamers of the said Company to Jacksonville, Fla., for Five Hundred head of live cattle (more or less) belonging to said party of the second part; and to supply them with necessary water on the passages, but is not to be accountable for the supply thereof in case of accident, detention, or other cause producing a short supply of water for the passengers and crew of said steamships.

The said cattle are to be put on board and taken from the steamers at the several points of embarkation and landing, at the sole risk of the said party of the second part.

And it is mutually understood and agreed, that the said party of the first part is to be in no manner liable for any accident that may happen to the said cattle on board of the said Steamers, by reason of the perils of the sea, sickness, disease or any other unavoidable cause whatsoever, they merely agreeing to furnish deck room and water for the said cattle as above mentioned.

In consideration of the above, the said party of the second part hereby agrees to pay to the said party of the first part (as per their contract) Dollars for such deck room and water for the said Cattle to be paid previous to the embarking at Port Limon, Costa Rica, no portion of which is to be returned in case of the death, disease, or other disability of the said cattle but is to be retained by said party of the first part, earned or not earned.

And in addition, the said party of the first part agrees, at his own expense, to provide the necessary food for the said cattle during the voyages, and proper persons to attend said cattle under direction of Armour is supercargo and also agrees to keep the stalls or quarters of the said cattle clean during the voyage, so that they may not be offensive nor prove a nuisance during the voyage.

The necessary supply of food for the said cattle during the journey to be taken by the Steamers free of freight.

In witness whereof, the said parties have hereunto set their hands and the seals the day and year first above mentioned, to three agreements, all of this tenor and

date, one of which being accomplished, the others to stand void.

THE CENTRAL AMERICAN  
CATTLE CO.,

(Signed) By O. R. WHILDEN, President,  
(Signed) ARMOUR & COMPANY,  
(Signed) EDWARD JAMES MITCHELL,  
Shipper.

Scaled and delivered in presence of:

(Signed) F. A. POCHE,  
(Signed) B. CHENIE.

All Vessels to have liberty to touch at any Port or Ports in any rotation or order in or out of the customary route, and to call at Port or Ports more than once.

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25 EXCEPTIONS BY FORT MORGAN SS. CO.,  
LTD.

Filed July 22nd, 1918.

United States District Court, Eastern District of  
Louisiana, New Orleans Division.

Armour and Company,

vs. Number 15,811  
In Admiralty.

Steamship "Fort Morgan."

Now into Court comes the Fort Morgan Steamship Company, Limited, claimant herein, and excepts and

objects to the filing herein of the document entitled a supplemental libel, on the following grounds:

First: Because said document prayed no citation, monition or notice of any kind to the claimant and none was given.

Second: Because said document was filed after the delay allowed therefor had passed and without extension of said delay by the Court, or other authority or order whatsoever.

Third: Because said document is not a compliance with the permission to amend given by the Court in order that libelant might cure the defects set up in the exceptions which had been maintained, inasmuch as said maintained exceptions had specifically claimed that libelant should set out when the alleged freight was paid, and should set out the alleged agreement between libelant and the Central-American Cattle Company, but said document does not state the date of such alleged payment otherwise than by stating that it was subsequent to some other date, and annexes, as to contract, only an alleged contract which specifically shows that it is merely a supplemental contract, as it leaves blank the freight rate and refers therefor to another contract which is not annexed.

And only in case said exceptions to filing be overruled but by no means waiving the same, exceptor excepts to said supplemental libel on said grounds.

26           Wherefore, exceptor prays that after proper proceedings these exceptions may be maintained and this suit dismissed.

(Signed)     DENEGRÉ, LEVY & CHAFFE,  
Proctors for Exceptor.

State of Louisiana,  
Parish of Orleans:

Victor Leovy, being duly sworn, deposes and says, that he is Proctor for exceptor filing the foregoing exceptions and that the same are true in fact and are not interposed for delay, and he further certifies that in his opinion said exceptions are well founded in law.

(Signed) VICTOR LEOVY.

Sworn to and subscribed before me at New Orleans, Louisiana, this Twenty-Second day of July, A. D. 1918.

(Signed) HENRY H. CHAFFE,

(Seal) Notary Public.

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27 HEARING AND SUBMISSION OF  
EXCEPTIONS.

Extract from the Minutes.

May Term, 1918.

New Orleans, Saturday, August 10th, 1918.

Court met pursuant to adjournment.  
Present:

Hon. Rufus E. Foster, Judge.

Armour & Company,  
vs. No. 15,811.  
Steamship "Fort Morgan."

This cause came on this day to be heard upon the exceptions filed by the claimant to the supplemental libel herein;

Present:

Denegre, Leovy & Chaffe, proctors for claimant, exceptor;

John D. Grace, proctor for libelant;

and was argued by counsel for the **respective parties** and submitted, when the Court took time to consider.

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28

OPINION OF THE COURT.

Filed September 23, 1918.

United States District Court, Eastern District of  
Louisiana.

Armour & Company,

vs.

No. 15,811.

Steamship "Ft. Morgan."

In this case the libel and supplemental libel fairly inform the claimants as to the cause of action so that the vessel should have no difficulty in formulating an answer. The exceptions will be overruled.

(Signed) RUFUS E. FOSTER, Judge.

Sept. 23/18.

29      ORDER OVERRULING EXCEPTIONS TO  
         SUPPLEMENTAL LIBEL.

Extract from the Minutes.

May Term, 1918.

New Orleans, Monday, September 23rd, 1918.

Court met pursuant to adjournment;

Present: Hon. Rufus E. Foster, Judge.

Armour & Company,

vs.

No. 15,811

Steamship "Fort Morgan."

This cause came on at a former day to be heard upon the exceptions filed by the claimant to the supplemental libel herein, and was argued by the proctors for the respective parties and submitted, when the Court took time to consider;

Upon due consideration thereof, and for the written reasons of the Court on file herein,

It is ordered by the Court that the said exceptions herein be, and the same are hereby, overruled.



30      **ORDER GRANTING CLAIMANT 30 DAYS  
         TO PLEAD.**

Extract from the Minutes.

May Term, 1918.

New Orleans, Tuesday, September 24th, 1918.

Court met pursuant to adjournment;

Present: Hon. Rufus E. Foster, Judge.

Armour & Company,

vs.

No. 15,811.

Steamship "Fort Morgan."

Upon the application of Messrs. Denegre, Leovy & Chaffe, proctors for claimant herein;

It is ordered by the Court that the said claimant be granted thirty (30) days' time from this date in which to answer or otherwise plead in this cause.

31      **ANSWER OF FORT MORGAN STEAMSHIP  
COMPANY, LTD., TO THE LIBEL AND  
SUPPLEMENTAL LIBEL.**

Filed October 19, 1918.

United States District Court, Eastern District of  
Louisiana, New Orleans Division.

Armour and Company,  
vs. No. 15,811, In Admiralty.  
Steamship Fort Morgan.

The answer of the Fort Morgan Steamship Company, Limited, claimant herein, with full reservation of its exceptions herein filed and by no means waiving the same, but protesting and excepting against the overruling thereof, to the libel and supplemental libel of Armour & Company, alleges and articulately propounds as follows:

First.

For answer to Article One of the original libel, respondent says that it has no knowledge sufficient for an answer as to the truth of the allegations thereof and asks that full proof thereof be required, if relevant.

Second.

For answer to Article Two of the said libel, respondent says that it is and was at all times hereinafter stated, the owner of the Steamship Fort Morgan, and that on and from about September 15, 1917, and thereafter, said steamship was under charter to the Gulf Coast Plantation Company, and by that Company to the Central American Cattle Company, Inc., and that as to the times

referred to in the original libel, the ship was employed under a contract between said Cattle Company and the libelant and not as common carrier, and respondent annexes hereto for fuller explanation and better certainty

and as part hereof, a copy of said charter-party  
32 to said Cattle Company, marked "Respondent A," and a copy of said agreement between said Cattle Company and libelant, in two parts, marked respectively, "Respondent B" and "Respondent C."

Respondent says that the making of said contract or agreement was wholly without authority from respondent, and said Cattle Company and libelant were bound so to know, and respondent accordingly so avers that they did so know, because said Cattle Company was a party to said charter and said libelant was a party to said agreement, in which it was specially provided that said Cattle Company should charter and equip ships for the carriage of cattle as described in said libel, and libelant was accordingly bound to take note that the Fort Morgan was a chartered ship and to see to it, at libelant's peril, that the charter should contain sufficient authority for the agreement, as to equipment and otherwise.

Respondent annexes hereto, for fuller explanation and greater certainty as part hereof, a copy of said charter-party, marked "Respondent A" and a copy of said agreement or arrangement, being in two parts, marked respectively "Respondent B" and "Respondent C." Respondent says that as to said arrangement or agreement its answer is upon information and belief.

### Third.

For answer to Article Three of said libel, respondent says that it is informed and believes that there was

laden on board said steamship, at about the place and time stated, a cargo of cattle, of the number stated, but as to whom belonging and consigned, and where destined, respondent has not sufficient information

33 for an answer and asks that full proof thereof be required, if relevant. Respondent says that it is informed and believes that the document, of which copy is annexed to the original libel, was in fact signed and delivered, but that it was in truth and in fact a mere part or portion of the arrangement or contract for the sale of cattle covered by the agreement hereinbefore mentioned. Respondent shows that said document shows on its face that it purports to be a negotiable bill of lading, and the original is neither produced nor accounted for, nor is there any averment as to who is the holder or owner of said original, and respondent asks that said original be produced, surrendered and canceled, if relevant, or if any rights are claimed thereunder.

Further answering, respondent says that as to the time when said bill of lading was executed and delivered, respondent has not sufficient information for answer, and asks that full proof be required, if relevant. Respondent says on information and belief that the loading of the cattle was commenced about noon on November 28th and was concluded about five or six o'clock on the afternoon of November 29th.

#### Fourth.

For answer to the Fourth Article of said libel, this respondent denies, as hereinafter more fully set forth, that said vessel was in an unseaworthy condition. As to the remaining allegations of said Article, respondent

has not sufficient information for answer and asks that full proof thereof be required, if relevant, except as hereinafter specifically set forth.

34

## Fifth.

For answer to the Fifth Article of said libel, respondent says that it is true that at the time of leaving the wharf, the vessel had a list, but that it was not unusual or dangerous, and said list did not increase to a dangerous extent until the vessel met unusually heavy seas, with their consequent affects upon the vessel and cargo, until finally, in the judgment of all, it became necessary to return, and the vessel did return.

## Sixth.

For answer to the allegations of Article Sixth of said libel, respondent says, on information and belief, that the allegations thereof are correct.

## Seventh.

For answer to Article Seventh of said libel, respondent says that it has not sufficient information for answer, and asks that full proof thereof be required, if relevant.

## Eighth.

For answer to Article Eighth of said libel, respondent says that it has not sufficient information for answer and asks that full proof thereof be required, if relevant.

## Ninth.

For answer to Article Ninth of said libel, respondent denies that said vessel was in an unseaworthy condition prior to, at, or after the commencement of said voyage.

Respondent says that the forepeak tank referred to in said Article is and was a small tank built into the ship for the purpose of supplying the boiler, and was properly filled, and a part of the water therein was properly used for that purpose. That the after peak is a small tank and could have been filled, but was not used, and its use would have had no substantial effect. That it is not true that Number One tank had only fourteen inches of water in it when the ship sailed, the fact being that it was full and was not leaky. The water for the ship's general use was taken from the tanks above water-line, and taking it could not effect the ship's stability injuriously. It is true that some water was taken from other tanks for the cattle's use, but not enough to affect the stability of the ship, and this method of supplying water to the cattle was according to the arrangements made by libelant, and under its direction.

As to the allegations that the ship was not suited to the carriage of such deck-load of cattle as it is averred she undertook to transport, respondent respectfully shows that the deck in question was added under inspection, direction and arrangement by the libelant, without authority from respondent, for the purpose of carrying cattle, and the cattle were so placed on said ship, and respondent pleads that libelant is estopped to complain thereof, especially as the arrangement and agreements, which it had made, as aforesaid, were not a mere and pure maritime contract of shipment, but an agree-

36           ment and arrangement for the purchase and sale  
           of cattle with arrangements for transportation  
           as a mere incident thereto. Subject to said  
 plea respondent says that said ship was entirely seaworthy in and of itself, and that even as loaded under the direction and arrangements of libelant, the cattle would have been safely transported but for the seas encountered, as aforesaid; but that if the fact be otherwise, the loss was due to the manner of loading under the direction, inspection and arrangements of libelant.

Further answering, respondent respectfully shows that, as hereinabove stated, the list of the ship on leaving the dock was merely an ordinary and usual list, common to said ship, and many other ships, and not at all rendering her unseaworthy, and the allegations as to decreasing or omitting to increase water-ballast thereafter or alleged effect of absence of water-ballast or amount of water-ballast at any time thereafter upon conditions as they arose thereafter are mere allegations of alleged faults or errors in the navigation or management of the vessel, for which, under the law and the provisions of the bill of lading filed by libelant, neither the ship nor its owners would be responsible, if true; due diligence having been exercised to make the vessel in all respects seaworthy and properly manned, equipped and supplied.

#### Tenth.

For answer to Article Tenth of said libel, respondent  
 37           says that only the usual and proper quantity of  
           coal was stowed in the shelter-deck bunker, and  
           the ship was not thereby rendered unseaworthy  
 nor unduly top-heavy thereby, nor was the ballast in-

sufficient. As to the stowage of cattle above the shelter-deck, respondent respectfully refers to and repeats what is said in regard thereto in its answer to Article Ninth.

#### Eleventh.

For answer to Article Eleventh of said libel, respondent denies absolutely that any freight whatever was paid to it or to any one for it. As to whether freight was paid to any one else, respondent has no information sufficient for answer and demands full proof thereof, if relevant. As to the allegations as to the alleged breaking up of the voyage, and failure to make due delivery, and as to what the vessel undertook, respondent respectfully refers to and repeats its answer in other parts of this answer, to the same allegations made in other parts of the libel. As to the alleged value of the cattle and the alleged damages, respondent has not sufficient information for answer, and demands full proof thereof, if relevant, subject to bill of lading and contract clauses hereinafter referred to.

#### Twelfth.

For answer to Article Twelfth of said libel, respondent says that libellant, for the reasons set forth in this answer, is not entitled to claim or demand any damages or other amount whatsoever. As to the allegations of said Article in other respects, respondent has not sufficient information for answer, except that about 210 died  
 38      and were later thrown overboard and the balance delivered to owners, and asks that full proof be required, if relevant, subject to bill of lading and contract clauses, hereinafter referred to.



## Thirteenth.

For answer to Article Thirteenth of said libel, respondent says that libelant, for the reasons set forth in this answer, is not entitled to claim or demand any damages or other amount whatsoever. As to the allegations of said article in other respects, respondent has not sufficient information for answer, and asks that full proof be required, if relevant, subject to bill of lading and contract clauses hereinafter referred to.

## Fourteenth.

For answer to Article Fourteenth, of said libel, respondent says that the premises stated in said libel are not true, except as hereinabove set forth, the truth being as set forth in this answer.

## Fifteenth.

For answer to Article First of supplemental libel, respondent denies that anything whatever is due to libelant. For answer to remaining allegations of said article and the exhibits therein referred to, respondent says that it has not sufficient information for answer, and requires full proof thereof, if relevant, subject to bill of lading and contract clauses, hereinafter referred to.

## Sixteenth.

For answer to Article Second of said supplemental libel, respondent says, on information and belief, that the live-stock agreement annexed to the supplemental libel was not the full and complete contract, which was in fact, as shown by exhibits B and C, hereto annexed.

## Seventeenth.

For answer to Article Third of said supplemental libel, respondent repeats as to the alleged payment of freight and as to the employment of the steamship Fort Morgan and the bill of lading and delivery thereof, its previous allegations herein in those regards. For answer to the other allegations of said article, respondent says that except as herein elsewhere set forth, respondent has no knowledge sufficient for answer, and asks that full proof be required, if relevant, subject to bill of lading and contract clauses herein referred to.

## Eighteenth.

For answer to Article Fourth of said supplemental libel, respondent says that the premises, as therein set forth, are not true as herein stated, the truth being as herein set forth.

## Nineteenth.

Further answering, respondent says that it is informed and believes that the Central American Cattle Company, Inc., brought suit in the Civil District Court for the Parish of Orleans, State of Louisiana, against the libelant herein, which suit was removed to this Court, being Number 15,813 of its docket, said suit being for the collection of amounts alleged to have been agreed

to be paid or alleged to be due under the  
 40 agreements hereinabove referred to; and that before answer was filed, arrangements and agreements, unknown to respondent, were made between the parties whereby suit was dismissed; and respondent says that having thus dealt with the charterer and

adjusted with the charterer the matters dispute, the libelant cannot pursue the ship.

Twentieth.

Further answering, respondent says that the bill of lading filed by libelant contains the following provisions, among others:

(1) A provision, in substance, in Article 5, that full freight should be paid in advance to said Central American Cattle Company and not reclaimed under any circumstances.

(2) A provision, in substance, that the carrier should not be liable for any loss, damage, delay, or default, by causes beyond the carrier's reasonable control or by dangers or accidents of the sea or other waters and of navigation or transportation of whatsoever nature or kind or by any latent or other defect in hull, machinery or appurtenances of the vessel, although existing at time of shipment or trans-shipment or the beginning of the voyage, provided due diligence shall have been exercised to make the same seaworthy, or by faults or errors in the navigation or management of the vessel, provided due diligence shall have been exercised to make the vessel in all respects seaworthy and properly manned, equipped and supplied, or by an act of omission of the owner of the goods or of his agent or representative.

41 (3) A provision, in substance, in Article 13 that in spite of errors of navigation, consignees or owners of cargo shall contribute to general average expenses provided due diligence has been used, as aforesaid.

(4) A provision in Article 14 that the agreement is subject to the Harter Act.

(5) A provision in Article 21 as to the amount of liability, if any, of the carrier, and especially that the carrier shall not be held liable for any alleged value exceeding invoice value nor for any special or consequential damage. Respondent specially shows that it is not liable for any of the alleged damages whatsoever, and it refers to said Article simply as a part of the bill of lading filed by plaintiff.

Respondent says that the application of said Articles to the facts and pleadings is made sufficiently clear by reference to the libel and what is heretofore said in this answer, and it respectfully makes such reference to avoid cumbersome repetition.

#### Twenty-First.

Respondent shows that said bill of lading also contains the following provision:

22. If there is opportunity to discover by examination before removal of the goods, that loss of contents or shortage of or damage to the goods exists or may exist, the carrier or vessel shall not be liable for any such loss,

42        shortage, or damage, unless notice of claim  
therefore be presented in writing to the carrier  
or to the master of agent of the vessel before  
removal of the goods. If there is no opportunity to  
discover before removal, that such loss, shortage or dam-  
age exists or may exist, then the carrier or vessel shall  
not be liable therefor unless such notice of claim be so  
presented within 48 hours after the removal of the goods.  
The carrier or vessel shall not, in any event, be liable

for any claim or demand arising hereunder or in respect of the goods unless notice of the claim be presented in writing to the carrier within thirty days after delivery of the goods to the carrier; and nothing shall be deemed a waiver of the provisions of this article except a written express waiver signed by the carrier.

Respondent says that there was opportunity to discover by examination before removal of the goods that such damage, if any, as did ever exist actually existed, or if not then apparent might exist; the condition of all cattle that were dead, if any, being apparent before removal, and the possibility of such damage to others, if any, as thereafter occurred being then apparent. Respondent says that no notice of claim therefor was presented in writing to the carrier or master or agent of the vessel before removal of the goods, and while denying that a verbal notice at any time or a later written notice would have been legal, valid, or effective, respondent denies that any verbal or written notice of claim was given either within forty-eight hours after removal of the goods or within thirty days after delivery  
43 of the goods.

#### Twenty-Second.

Respondent further shows that said bill of lading also contains the following provision:

25. Live birds or animals and livestock are received at sole risk of shipper, consignee, and/or assigns, the vessels not having any special equipment therefor, and are subject in other respects to the provisions of this bill of lading and are to be deemed included in the term "Goods."

## Twenty-Third.

Further answering, respondent says that the said bill of lading contained also the following provision:

23. In case of any loss or damage for which the carrier shall be liable, the carrier shall, to the extent of such liability, have the full benefit of any insurance which may have been effected upon the goods or against such loss or damage, and as well also of any payment to insured by underwriters responsible only out of recovering against the carrier notwithstanding the underwriters were not obligated to make such payment.

Respondent says that it is informed and believes, from the intervention of an insurance agent with respect to the disposition of said cargo and other details that the same was insured; and while the respondent knows no more on the subject, it avers that it is entitled to obtain and present full evidence in regard thereto and to full benefit of said clause if held liable herein, against which it protests.

44

## Twenty-Fourth.

Further answering, respondent specially shows that by said agreement of November 29, 1917, of which copy is annexed to said supplemental libel, it was specially provided that the Central American Cattle Company, Inc., was to furnish room on the decks and hold, and that the consideration paid was for deck-room and water, and that the said Company was to be in no manner liable for any accident that might happen to said cattle, by reason of the perils of the sea, sickness, dis-

ease, or any other unavoidable cause whatsoever, they merely agreeing to furnish deck and hold room, and water for said cattle. The copy of said contract annexed to the supplemental libel is hereby referred to for fuller explanation and better certainty.

Twenty-Fifth.

Further answering, this respondent shows that by reason of the facts hereinabove set forth and the facts set forth in the petition hereinafter described, the Central American Cattle Company, Inc., a corporation organized and existing under the laws of the State of Louisiana, with its office and principal place of business at New Orleans, Louisiana, should be made a party defendant to this proceeding and respondent files at this time its petition for such proceeding and for proper decree.

Wherefore, respondent prays that after all proper proceedings, a decree may be rendered in its favor and against libelant, dismissing libelant's said libel, and for all costs, and it further prays, as in its petition filed herewith, that the Central American Cattle Company may be made party defendant to this suit, and such decree rendered as between it and libelants as law and justice may require, and that if any decree whatsoever be rendered in favor of libelant against this respondent, against which it protests, that the same decree, with all costs, interest and expenses of every kind be rendered in respondent's favor as against said Central American Cattle Company, Inc., and for all general relief.

(Signed)      DENEGRE, LEOVY & CHAFFE,  
Proctors for Respondent.

State of Louisiana,  
 Parish of Orleans,  
 City of New Orleans:

Victor Leovy, being first duly sworn, deposes and says that he is one of the Proctors herein for the Fort Morgan Steamship Company, filing the foregoing libel; that said Company is a corporation of Norway and its officers and said steamship Fort Morgan are absent from Louisiana; that the foregoing answer has been prepared by affiant upon information furnished him on behalf of respondent, and that it is true and correct to the best of his knowledge, information and belief.

(Signed) VICTOR LEOVY.

Sworn to and subscribed before me at New Orleans, Louisiana, this 19th day of Oct., 1918 A. D.

(Signed) HENRY H. CHAFFE,

(Seal)

Notary Public.

46                      RESPONDENT'S EXHIBIT A.—TIME-  
    CHARTER.

October 19, 1918.

Arthur H. Page Co., Limited.  
 Steamship Agent and Ship Brokers,  
 220-222 Hennen Building,  
 New Orleans, La.

Cable Address.

"Page" New Orleans.

All Commercial Codes Used.

Time Charter—West India Fruit Trade.

This Charter Party, made and concluded in the City of New Orleans, the 23rd day of August, 1917, between



Gulf Coast Plantation Company of the good Steel Screw Steamship "Fort Morgan" of 1120 of tons gross register, having engines of 186 nominal horse power, provided with proper certificate for hull and machinery, and classed Norwegian Veritas, and The Central-American Cattle Company, Incorporated.

Witnesseth, That the said Owners agree to let, and the said Charterers agree to hire the said steamship from the time of delivery at New Orleans, La., about September 15th, 1917, for a period of twelve (12) calendar months, having cleaned bottom, she being on her delivery at New Orleans, La., ready to receive cargo, and being tight, staunch, strong and in every way fitted for the service, having water ballast, steam winches and donkey boiler, with capacity to run all the steam winches at one and the same time, including necessary dunnage (and with full complement of officers), seamen, engineers and firemen for a vessel of her tonnage, to be employed in carrying lawful merchandise including petroleum or its products, in cases, and passengers so far as accommodations will allow, but any expense to suit U. S. passenger inspection to be borne by Charterers, between any safe port and/or ports in the United States of America and/or West Indies and Gulf of Mexico, and/or Carribean Sea, and/or Central America (Magdalena River excluded), and/or South America, not south of the River Plate, as the Charterers or their Agents shall direct, on the following conditions:—

1. That the owners shall provide and pay for all provisions, wages and consular shipping and discharging fees of Captain, officers, Engineers, Firemen and Crew; shall pay for the insurance of the vessel, also for all engine-room and deck stores, and maintain her in

a thoroughly efficient state in hull and machinery for and during the services, guaranteeing to maintain the boilers in a condition to bear working pressure of at least 60 pounds (and this pressure to be carried continuously) during the whole term of this charter, and to victual and provide for all passengers in the best manner according to their class, Charterers paying at the rate of \$2.00 per day for each first-class passenger.

2. That the Charterers shall pay and provide for all the coal, port charges, pilotage, agencies, and commissions, and Charterers shall accept and pay for all the coal in the steamer's bunkers on delivery, at the current rate of . . . . . per ton of 2,240 lbs., and the owners shall, on expiration of this charter, pay for all coal left in the bunkers at the market price at the respective port where she is delivered to them.

3. That the Charterers shall pay for the use of said vessel Sixteen thousand dollars (\$16,000.00) lump sum, per calendar month, commencing from the time the vessel is entered at the Custom House and placed with clear holds at the Charterers' disposal, and at and after the same rates for any part of a month, hire to continue from the time specified for terminating the charter until her delivery to owners (unless lost) at a port in the United States. Payment of said hire to be made in Cash in U. S. Currency, half-monthly in advance from the date of delivery of steamer, and in default of such payment the Owners shall have the faculty of withdrawing the said steamer from the service of the Charterers, without prejudice to any claim they, the Owners, may otherwise have on charterers in pursuance of this charter; cash for ship's necessary disbursements, if desired by master, but not exceed £250 monthly, to be supplied

by Charterers, to the captain at current rate of exchange, subject to a commission of  $2\frac{1}{2}$  per cent. to cover all charges, and Captain's receipt to be taken as part payment of the freight. That should the steamer be on her voyage towards the port of return delivery at the time a payment of hire comes due, said payment shall be made for such a length of time as Owners, Agents and Charterers, or their agents, may agree upon as the estimated time necessary to complete the voyage, and when the steamer is delivered to Owner's agent, any difference shall be refunded by steamer or paid by Charterers, as the case may require.

4. That the cargo or cargoes shall be laden and/or discharged with the assistance of the steamer's crew and tackle, in any dock or at any wharf or place that the Charterers or their agents may direct, provided the steamer can always safely lie afloat at all times of tide. That the whole reach of the steamer's holds, decks and all places of loading and passenger accommodation of the steamer (not being more than she can reasonably carry and stow), shall be at the Charterer's disposal, reserving only proper and sufficient space for ship's officers, crew, tackle, provisions, stores and fuel. That the captain shall prosecute his voyage with the utmost dispatch, and take every advantage of the wind by using the sails with a view to economize fuel, and shall render all possible assistance with ship's crew and boats. That the captain, although appointed by the Owners, shall be under the orders and direction of the Charterers as regards employment, agency or other arrangements; and the Charterers hereby agree to indemnify the Owners from all consequences or liabilities that may arise from the captain signing bills of lading or otherwise com-

plying with their orders and directions. That if the Charterers shall have reason to be dissatisfied with the conduct of the captain, officers or engineers, they shall make such complaint in writing to an agent in New Orleans, La., specially appointed by Owners, who shall have full power to act on their behalf, and if necessary, dismiss any of the officers should they find the complaints made by the Charterers are justified and proven.

5. That the Charterers shall have permission to appoint a supercargo, who shall accompany this steamer and be furnished free of charge with first-class fare and accommodation, and to see that voyages are prosecuted with the utmost dispatch; the crew to follow his directions and instructions in putting on and taking off hatches, ventilation, etc. Captain to report at Charterer's office at least once a day. That the Master shall be furnished from time to time with all requisite instructions and sailing directions, and shall keep a full and correct log of the voyage or voyages, which are always to be open to inspection of the Charterers or their agents.

7. That in the event of loss of time from deficiency of men or stores, break down of machinery or damage preventing the working of the steamer for more than twenty-four hours at sea, the payment of hire shall cease until she be again in an efficient state to resume her service, and should she in consequence put into any port other than to which she is bound the port charges and pilotages at such port shall be borne by steamer's owners; but should the vessel be driven into port or to anchorage by stress of weather or from any accident to the cargo, such detention or loss of time shall be at Charterer's risk and expense; also if any loss of time

from crew or stores not being on board in time, or from repairs to hull and machinery, which are for owner's account, not being complete after cargo and coals are on board and hour of sailing has been fixed by Charterers, and notice given to captain, the time lost is for the steamer's account.

8. That should the vessel be lost, any hire paid in advance and not earned (reckoning from the date of her loss) shall be returned to the Charterers with interest from date of loss. The Act of God, the King's Enemies, Fire, Restraint of Princes, Rulers and People, and all other dangers and accidents of the seas, rivers, machinery, boilers and steam navigation throughout this Charter Party always excepted.

9. That should any dispute arise between Owners and Charterers, the matters in dispute shall be deferred to three persons in New Orleans, La., one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of Court. That the owners shall have a lien on all cargoes and all sub-freights for any amounts due under this charter and the Charterers shall have a lien upon the ship for all moneys paid in advance and not earned.

10. Ship's bottom to be kept properly cleaned and steamer to be docked whenever Captain and Charterers may think it necessary; but at least once in every six months. And payment of hire to be suspended until she is again in proper state for the service.

11. Steamer to work night and day if required by Charterers, and all steam winches to be at Charterer's disposal during loading and discharging. Steamer to provide men to work winches both day and night as required. Charterers agreeing to pay for any night work incurred at the current local rate. That the steamer be provided with awnings throughout during the whole of this charter, also with wind sails for each hatch, besides stationary ventilators placed at convenient places throughout the deck as Charterers may direct. That the steamer shall be provided with loose planks, 2 to 2½ inches thick, to make a platform or deck, all through the vessel's hold, and also provided with beams for such temporary platform or deck to rest on, building the same strong enough to hold tiers of fruit. That the crew is not allowed under any circumstances to carry Bananas or other merchandise for their own account. Donkey boiler not to be worked when carrying Bananas. That should the steamer have an iron deck, the owners shall agree to have the same sheathed all through with 2½ inch planks, or otherwise Charterers to do it at owner's expense.

12. That on account of the perishable nature of the cargoes that this steamer is intended to carry, she is now allowed to stop to pick up any wreck or in any way assist or tow any vessel, especially when by so doing she is liable to be detained, only in order to save human life. But should any towage or salvage be earned it is understood it is to be divided between Owners and Charterers equally, after deducting any expenses, such as broken tow ropes, bits, etc., or lost time, coal, etc.

13. That a commission of five per cent. upon the gross amount of this Charter, and usual freight broker-

age, payable by steamship and owners, is due to Arthur H. Page Co., Limited, upon signing hereof, steamship lost or not. And also upon any continuation or extension of this charter or sale of vessel.

14. Penalty for non-performance of this contract, estimated amount of damages.

(Sgd.) GULF COAST PLANTATION CO.  
R. T. BURGE,

Pres. and Gen'l Mgr.

(Sgd.) THE CENTRAL-AMERICAN  
CATTLE CO.,  
O. R. WHILDEN,

President.  
Charterers.

Witness the signature of both.

(Sgd.) J. C. LHOTE.

Witness to the signature of

.....

We certify this to be a true copy of the original stamped Charter Party in our possession.

In case of the bona fide sale of this steamer, the owners to have the privilege of withdrawing same after December 15th, 1917, up to May 15th, 1918, by giving the charterers thirty (30) days' notice; and from May 15th, 1918, to Sept. 15th, 1918, sixty (60) days' notice. The Charterers however, to have the privilege of purchasing the ship at any time during the life of this charter for the sum of Three Hundred and Fifty Thousand Dollars (\$350,000.00). Any offer received by the owner for said amount shall be first submitted to charterers

11. Steamer to work night and day if required by Charterers, and all steam winches to be at Charterer's disposal during loading and discharging. Steamer to provide men to work winches both day and night as required. Charterers agreeing to pay for any night work incurred at the current local rate. That the steamer be provided with awnings throughout during the whole of this charter, also with wind sails for each hatch, besides stationary ventilators placed at convenient places throughout the deck as Charterers may direct. That the steamer shall be provided with loose planks, 2 to 2½ inches thick, to make a platform or deck, all through the vessel's hold, and also provided with beams for such temporary platform or deck to rest on, building the same strong enough to hold tiers of fruit. That the crew is not allowed under any circumstances to carry Bananas or other merchandise for their own account. Donkey boiler not to be worked when carrying Bananas. That should the steamer have an iron deck, the owners shall agree to have the same sheathed all through with 2½ inch planks, or otherwise Charterers to do it at owner's expense.

12. That on account of the perishable nature of the cargoes that this steamer is intended to carry, she is now allowed to stop to pick up any wreck or in any way assist or tow any vessel, especially when by so doing she is liable to be detained, only in order to save human life. But should any towage or salvage be earned it is understood it is to be divided between Owners and Charterers equally, after deducting any expenses, such as broken tow ropes, bits, etc., or lost time, coal, etc.

13. That a commission of five per cent. upon the gross amount of this Charter, and usual freight broker-



age, payable by steamship and owners, is due to Arthur H. Page Co., Limited, upon signing hereof, steamship lost or not. And also upon any continuation or extension of this charter or sale of vessel.

14. Penalty for non-performance of this contract, estimated amount of damages.

(Sgd.) GULF COAST PLANTATION CO.  
R. T. BURGE,  
Pres. and Gen'l Mgr.  
(Sgd.) THE CENTRAL-AMERICAN  
CATTLE CO.,  
O. R. WHILDEN,  
President.  
Charterers.

Witness the signature of both.  
(Sgd.) J. C. LHOUE.

Witness to the signature of  
.....

We certify this to be a true copy of the original stamped Charter Party in our possession.

In case of the bona fide sale of this steamer, the owners have the privilege of withdrawing same after December 15th, 1917, up to May 15th, 1918, by giving the charterers thirty (30) days' notice; and from May 15th, 1918, to Sept. 15th, 1918, sixty (60) days' notice. The Charterers however, to have the privilege of purchasing the ship at any time during the life of this charter for the sum of Three Hundred and Fifty Thousand Dollars (\$350,000.00). Any offer received by the owner for said amount shall be first submitted to charterers

for their refusal. The steamer may also be withdrawn by giving the notices above stated in case the United States Government or the Norwegian Government should withdraw the ship from the owners, charterers to have the liberty of subletting the steamer, if required by them.

47                      RESPONDENT'S EXHIBIT B.

Filed October 19, 1918.

United States District Court for the Eastern  
District of Louisiana.

The Central American Cattle Company, Inc.,

versus

No. 15,813.

Armour & Company.

Memorandum of agreement, made and entered into this 3rd day of October, A. D. 1917, by and between the Central American Cattle Company, Inc., a Louisiana corporation, with principal office in the City of New Orleans, Louisiana, first party, and Armour and Company, a corporation of Chicago, Illinois, second party,

Whereas, first party is in a position to obtain approximately twenty-five thousand (25,000) cattle in the Central American Countries of Guatemala, Honduras, Nicaragua and Costa Rica, and Mexico, and transport them by steamer to the United States, and:

Whereas, Armour and Company is operating a slaughter house at Jacksonville, Florida, available for the receipt and slaughter of Central American and Mexican cattle,

Now, therefore, this agreement witnesseth:

First party will procure cattle in the Central American countries above named and bring them to Port Limon, Costa Rica, or such other port as may be agreed upon by the parties, such cattle to be held at or near Port Limon (or other port) for at least fifteen days in order for the cattle to become thoroughly rested, watered, fed, inspected, etc., before loading upon the Steamer.

Second party to have the privilege of having a representative at the port of loading for the purpose of examining [examining] the contract cattle and observing the weighing of same which weighing is to be done on suitable ground or railroad track scales as soon as practicable before the cattle are driven on the steamer.

It is understood that this contract contemplates the sale by first party and purchase by second party of good beef steers only weighing eight hundred (800) pounds and upwards on the hoof, and excludes bulls, oxen and females, such cattle to be acceptable to the representatives of a second party at the time of loading, and also pass the inspection of veterinary of the Bureau of Animal Industry of the United States Department of Agriculture at the Loading port.

The price to be paid by second party for good beef steers weighing eight hundred (800) pounds and upwards, as above provided, to be five cents (5c) per pound United States Money without discount or commission. Should first party have cattle other than beef steers, as above described, second party may have the privilege of buying the same and applying them on this contract, provided the representative of first and second parties are able to agree upon a price at the time, and also agree upon a satisfactory ocean freight rate.

Payments for all cattle to made by second party by draft to the order of first party delivered to the office of first party in New Orleans, Louisiana, upon receipt of cable advise from the representative of the second party at the port of loading; specifying the number of cattle accepted and loaded on the steamer and the weight of same Cattle other than the kind described in the above paragraph shall be accepted by the representative of the second party at another price and at another rate of ocean freight which shall be mutually agreed upon. The payment for the second grade of cattle shall be made in the same manner as for the first grade.

49 Ocean-freight is to be payable in New Orleans, Louisiana, when word has been received that the steamer has been loaded and the number of head aboard is known. The rate of ocean freight shall be \$25.00 per head for each beef steer weighing eight hundred (800) pounds and upwards. The rate on other cattle is to be mutually agreed upon by the representative of the party of the first part and the representative of the party of the second part at the time such other grades of cattle are loaded.

It is understood that first party is to charter and equip one or two steamers for carrying such cattle. All such equipment to be at the expense of first party, or the steamship company, and to be constructed to the satisfaction of the inspector of the underwriters interested; the steamers to be suitably and properly ventilated, with sufficient space for each animal; and, in addition, ample space to feed and water said cattle. Likewise, steamer to provide ample supply of good fresh water for the cattle and ample supply of United States hay or native grasses for feed for said cattle during the voyage; and excess of such hay or grass to be delivered to second party at Jacksonville, Florida, when the cattle are un-

loaded, at actual cost at point of shipment to first party if second desires the same. No other cattle or other animals, than those consigned to second party, as afore-said, shall be carried on any voyage of said steamer or steamers.

First party shall provide a sufficient number of attendants to properly feed, water and take care of the cattle during the voyage, and also allow a free cabin passage over and back to a super-cargo to be appointed by second party to properly supervise the feeding, watering and taking care of cattle during the voyage.

Second party is not to be put to any expense in connection with feeding and taking care of cattle in the port before unloading in case of delay in discharging at Jacksonville, unless such delay is attributable to second party.

Second party will furnish free wharfage at Jacksonville, where vessel can discharge always safely  
50      afloat but all port charges shall be for account of first party.

Second party shall receive cattle on dock as fast as vessel can discharge the cattle.

And for each day's detention by default of second party demurrage at the rate of \$600.00 per day shall be paid by said second party to said first party.

It is understood and agreed that all cattle sold by first party and purchased by second party under this contract shall be delivered on board the steamers free of any expense to second party, that is, first party will assume and pay all expenses in connection with handling the cattle at the port of loading, weighing charges, export or customs, duties, if any; likewise the twenty-five dollars (\$25.00) per head freight charges, as above provided, shall include all expenses of wharfage, dockage, or

charges of like nature which may be payable at said port of loading.

It is further understood and agreed that first party will endeavor, so far as possible, to furnish second party a steamer load of cattle every week or ten days in order that second party may have a dependable supply of cattle from this source. Second party, however, shall not be obligated to accept more than one thousand (1000) head of such cattle in any one week.

As herein provided, first party shall have the option and privilege of shipping from other Central American ports than port Limon should it be more convenient to do so. In the event of making shipments from other ports, however, first Party shall notify second party long enough in advance so that it can arrange to have its representative present at said port when the steamer is ready for loading, and, likewise, arranged for the Bureau of Animal Industry to provide a veterinary for inspection at such port of loading.

It is mutually understood and agreed that this  
51 contract, being in the nature of an experiment  
in shipping Central American cattle into the United States, that if after the shipment of eleven hundred (1100) head of cattle by first party, it is determined, by either party, that the arrangement is unprofitable or impracticable either party may have the option of cancelling this contract unless a readjustment of prices, which are mutually satisfactory, can be made. In this event, however, it is agreed that neither party enter into any similar contract with any other person, or persons, firm or corporation, without giving the other party an opportunity of contracting for the purchase and sale of said cattle on the same terms; that is, each party shall give the other the first refusal of any similar contract which it may contemplate making with any other person or persons, firms or corporations.

The terms of this contract shall be from the date hereof until the twenty-five thousand (25,000) cattle shall have been purchased by second party and received at its Jacksonville plant not exceeding a total time of one year from date.

This contract and agreement is signed subject to a certain bill pertaining to cattle importation, becoming a law and further subject to the ability of either or both parties being able to comply with such regulations or restrictions as may prescribed by the Secretary or Treasury, the Secretary of Agriculture, or other United States Government officials duly authorized to impose the same.

It is understood any steamer or steamers put in this service shall be classed 100-A1 British Lloyds or equivalent.

THE CENTRAL AMERICAN  
CATTLE COMPANY, INC.,

By O. R. WHILDEN, President.

Attest:

JOHN H. JONES.

ARMOUR AND COMPANY,

By V. H. MUNNECKE.

Attest:

R. H. LATTO.

E. & O. E.

52

RESPONDENT'S EXHIBIT C.

Filed October 19, 1918.

The Central American Cattle Company, Inc.  
Live Stock Contract.

All vessels to have liberty to touch at any port or ports in any rotation or order in order out or the customary route, and to call at port or ports more than once.

Memorandum of agreement, made this Twenty-ninth day of November, 1917, between the Central Am. Cattle Company of the first part, and Armour & Company of the second part, viz: The said party of the first part hereby agrees to furnish room on the decks and in the holds of the steamer of the said Company from Port Limon, Costa Rica, to Jacksonville, Fla., for five hundred head of live cattle (more or less) belonging to said party of the second part; and to supply them with necessary water on the passage, but it is not to be accountable for the supply thereof in case of accident, detention or other cause producing a short supply of water for the crew of said Steamships.

The said cattle are to be put on board and taken from the steamers at the several points of embarkation and landing at the sole risk of the said party to the second part.

And it is mutually understood and agreed, that the said party of the first part is to be in no manner liable for any accident that may happen to the said cattle on board of the said steamers, by reason of the perils of the sea, sickness, disease or any other unavoidable cause whatsoever, they merely agreeing to furnish deck and hold-room and water for the said cattle as above mentioned.

In consideration of the above, the said party of the second part hereby agrees to pay to said party of the first part (as per their contract) ..... Dollars for such deck room and water for the said cattle to be paid previous to the embarkation at Port Limon, Costa Rica no portion of which is to be returned in case of the death, decrease or other disability of the said cattle but is to be retained by said party of the first part,



53      earned or not earned. And in addition, the said party of the first part agrees, at his own expense, to provide the necessary food for the said cattle during the voyages, and proper persons attend said cattle under direction of Armour's super-cargo and also agrees to keep the stalls or quarters of said cattle clean during the voyage, so that they may not be offensive nor prove a nuisance during the voyage.

The necessary supply of food for the said cattle during the voyage to be taken by the Steamer free of freight.

In witness whereof, the said parties have hereunto set their hands and seals the day and year first above mentioned, to three agreements all of this tenor and date, one of which being accomplished, the others to stand void.

THE CENTRAL AMERICAN  
CATTLE COMPANY, INC.,

(Signed) O. R. WHILDEN, President.  
Shipper.

ARMOUR AND COMPANY,

(Signed) EDWARD JAMES MITCHELL,  
Shipper.

Sealed and signed in presence of

(Signed) F. A. S. DOOKE,

(Signed) B. CHENIE.

vg.

### Steamship Fort Morgan.

The petition of the Fort Morgan Steamship Company, Limited, a corporation organized under the laws of the Kingdom of Norway, respectfully shows:

That petitioner is, and was at all of the times herein-after set forth, a corporation duly organized and existing under the laws of the Kingdom of Norway, and the owner of the Steamship Fort Morgan.

That at all of the times hereinafter mentioned the said Steamship was under charter by petitioner to the Gulf Coast Plantation Company, and by the Gulf Coast Plantation Company to the Central-American Cattle Company, Inc., a corporation organized under the laws of Louisiana, and having a place of business at New Orleans, Louisiana.

That, as affiant is informed and believes, and so avers, said Cattle Company made with Armour and Company,

a corporation of Chicago, Illinois, a written agreement, dated October 3d, 1917, supplemented by a written agreement, dated November 29, 1917, for the sale of cattle and their transportation from Port Limon, Costa Rica, to Jacksonville, Florida, in which it was agreed in said first dated agreement, among other things, that  
55 said Cattle Company would charter and equip ships for such transportation. Copies of such agreement and supplemental agreement are filed with respondent's answer filed herein and are referred to as part hereof.

#### Fourth.

That on or about November 28, 1917, there was loaded, by procurement of said Cattle Company, on said steamship Fort Morgan, at the Port of Limon, Costa Rica, by it or said Armour and Company, four hundred and twenty head of live cattle, and the Master of said Steamship, at the procurement of said Cattle Company, signed, with said Cattle Company, and delivered to said Armour and Company, a bill of lading for the transportation of the same to Jacksonville, and delivery to shipper's order.

#### Fifth.

That prior thereto, without authority or permission from petitioner, the owner of said ship, the said Cattle Company had proceeded to alter the equipment of said ship, particularly by the addition of an additional deck for the carrying of cattle and in other respects.

#### Sixth.

That after said cattle were loaded, the said ship left said port, but after proceeding a short distance, en-

countered heavy seas and returned to the port and discharged her cargo.

#### Seventh.

That said Armour and Company have filed a libel in these proceedings, claiming to have been the owners of said cattle, and that said cattle were injured  
 56 by said occurrences and that by the facts above stated they have suffered a loss of thirty-one thousand dollars, and asked that said ship be seized and sold to satisfy the same and reimburse them for said loss, with interest and costs; and said ship was so seized and was released on claim and bond by petitioner, and after exceptions of vagueness, filed by petitioner, were sustained and additional details furnished by supplemental libel, and farther exceptions overruled, petitioner is this day filing its answer to said libel. Petitioner respectfully refers to the record herein as showing said proceedings at length, and with greater certainty.

#### Eighth.

Petitioner shows that in its said libel, the said Armour and Company avers that the said steamer was unseaworthy, and not suited to the carriage of such a deck-load of cattle. Petitioner shows that if these allegations be true, the sole responsibility, therefore, as far as petitioner is concerned, lies with the said Cattle Company, in that it undertook, without authority from petitioner, the owner of said ship, to equip the same for the carriage of such deck-load, and any fault other than those attributable to said Armour and Company, whether in equipment or loading, or otherwise, being wholly due to said unauthorized agreement and the manner of per-

formance thereof, in which neither petitioner nor any one authorized to act for it in such regard was in any wise at fault.

37

## Ninth.

Petitioner shows that the said Central American Cattle Company brought a suit, coupled with attachments, against the said Armour and Company for the payment of freight, and other expenses, said suit being filed in the Civil District Court for the Parish of Orleans, Louisiana, and removed to this Court, being Number 15,813 of its docket, and that thereafter, without answer filed, said suit was voluntarily withdrawn, under some agreement between the parties as to which petitioner has no knowledge, and as to which it has never been informed save as to the fact of such agreement, which is plainly to be understood from said proceedings.

## Tenth.

Petitioner further shows that in said charter-party to said Central American Cattle Company, Inc., it was provided as follows:

That the captain, although appointed by the owners shall be under the order and direction of the charterers as regards employment, agency or other arrangements; and the Charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the captain signing bills of lading or otherwise complying with their orders or directions.

## Eleventh.

Petitioner shows that it is necessary and proper that said Central American Cattle Company, Inc., be made a

party defendant in this proceeding, and that it ought to be proceeded against herein.

58

Twelfth.

That all and singular, the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Thirteenth.

Petitioner filed herewith its answer to said libel, and a proper stipulation with sufficient surety to pay to the libelant and to any claimant or new party brought into this suit, by virtue of the process herein prayed for, all such costs, damages and expenses as shall be awarded against the petitioner by this Court, upon its final decree, whether rendered in the original or appellate Court.

Wherefore, petitioner prays that this petition may be filed and that process in due form of law according to the course of this Honorable Court in matters of Admiralty and maritime jurisdiction may issue against the said Central American Cattle Company, Inc., citing it to appear and answer on oath the said original and supplemental libels [libels] herein, and this petition; and that after all proper proceedings the Court will render its decree in favor of this petitioner, dismissing the said libels as against it, and holding the said Central American Cattle Company, Inc., solely responsible for such amount, if any, as said libelant may be entitled to recover again any person, firm or corporation, and that in case of any decree in favor of libelant against this respondent, against which it protests, that the same decree, with all costs, expenses and interests, be rendered in the same decree in petition-

59

er's favor against said Central American Cattle Company, Inc., and petitioner prays for all costs and such other or further order or decree as to law and justice may pertain.

(Signed) DENE GRE, LEOVY & CHAFFE,  
Proctors for Petitioner.

State of Louisiana,  
Parish of Orleans,  
City of New Orleans.

Victor Leovy, being first duly sworn, deposes and says that he is one of the proctors for the Fort Morgan Steamship Company, Limited, filing the above petition; that the said Company is a corporation of Norway, and its officers and said ship Fort Morgan are absent from Louisiana; that the foregoing petition is prepared on information furnished affiant, on behalf of said company, and is true and correct to the best of his knowledge, information and belief.

(Signed) VICTOR LEOVY.

Sworn to and subscribed before me at New Orleans, Louisiana, this 19th day of October, 1918, A. D.

(Signed) HENRY H. CHAFFE,  
(Seal) Notary Public.

Order.

Let this petition be filed and let process issue accordingly.

(Signed) RUFUS E. FOSTER, Judge.  
New Orleans, October 19, 1918.

## CITATION.

Issued October 19, 1918.

United States of America, Eastern District of Louisiana.

The President of the United States of America.  
To Central-American Cattle Company, Inc:

Whereas, a petition has been filed in the District Court of the United States of America, for the Eastern District of Louisiana (N. O. Division), on the 19th day of October, in the year of our Lord one thousand nine hundred and eighteen by the Fort Morgan Steamship Company, Claimant of the Steamship "Fort Morgan", against Central-American Cattle Company, Inc., in a certain action civil and maritime for damages therein alleged to be due the said petitioner or to Armour & Co., the said libelant herein, amounting to \$31,000.00, with interest, expenses and costs, interest and cost, and praying that a citation may issue against the said respondent pursuant to the rules and practice of this Court.

Now, therefore, you are hereby cited and admonished to be and appear before the said District Court on the 18th day of November, 1918, at the United States Court Room in the New Post Office Building, in the City of New Orleans, La., then and there to answer the said original & supplemental libels of said Armour & Co., and said petition, and to make your allegations in that behalf.

Witness, the Honorable Rufus E. Foster, Judge of the said Court, at the City of New Orleans, this 19th day



of October, A. D. one thousand nine hundred and eighteen, and of the Independence of the United States of America, the 134th year.

Clerk's Office: A true copy.

(Signed) H. J. CARTER,  
(Seal) Clerk.

New Orleans, La., October 19, 1918.

(Signed) H. J. CARTER,  
Clerk.

By .....  
Deputy Clerk.

Received by: U. S. Marshal, New Orleans, La., October 19th, 1918.

And on the 21st day October, 1918, I served the original of which this is a certified copy on the Central-American Cattle Co., Inc., by handing same to O. R. Whilden, President of said Company, in New Orleans, La.

(Signed) FRANK M. MILLER,  
U. S. Marshal.

By D. A. SANDERS,  
Dy. U. S. Marshal.

61           **EXCEPTION AND ANSWER OF THE CEN-  
              TRAL AMERICAN CATTLE CO.**

Filed December 12th, 1918.

United States District Court, Eastern District of Louis-  
ana, New Orleans Division.

Armour & Company,  
              versus   No. 15811, In Admiralty.  
Steamship "Fort Morgan."

Now into Court comes The Central-American Cattle Company, Inc., appearing solely for the purpose of exception, and excepts to the petition impleading it, on the ground that the said petition fails to set forth a right, under the rules and practice of the Admiralty Court, to implead exceptor, and fails also to set forth a cause of action either in favor of libelant, Armour & Company, or in favor of the claimant, Fort Morgan Steamship Company, Limited, as against exceptor.

Wherefore, exceptor prays that this exception be maintained, and that the petition to implead it be dismissed, and the order of Court thereon be vacated, and, in the alternative, that the exception of no cause of action be maintained, and that the libel and petition as against exceptor be dismissed.

Reserving the benefit of the foregoing exception, The Central-American Cattle Company, Inc., for answer to the petition impleading it, says:

First: The allegations of the first article of the petition are admitted to be true.

62           Second: The allegations of the second article of the petition are admitted to be true.

Third: In answer to the third article of the petition, it is true that a written agreement and a supplemental written agreement were made between Armour & Company and The Central-American Cattle Company, Inc., on the dates named herein and covering the subject matter substantially as alleged, but respondent prefers to let the agreements referred to speak for themselves.

Fourth: In answer to the fourth article of the libel, it is true that, on or about November 28, 1917, 420 head of live cattle were laden on board the Steamship "Fort Morgan" at Port Limon, Costa Rica, and there delivered to Armour & Company, under the terms of the agreement and supplemental agreement heretofore referred to. Upon the delivery of said cattle on board, the cattle became the property of Armour & Company, under the terms of said agreements, and a bill of lading therefor was delivered by the master of the Steamship "Fort Morgan" to Armour & Company. The cattle were to be transported from Port Limon to Jacksonville, Florida, delivery to shipper's order.

Fifth. In answer to the fifth article of the petition, respondent had no relation, either by contract or otherwise, with Fort Morgan Steamship Company, Limited, petitioner, and made no application to it for authority to equip the steamer for transportation of cattle. Respondent's charter party was with Gulf Coast Plantation Company only, and the consent of that company to the equipment of the steamer for the transportation of cattle was given. In so far as respondent was concerned, the master of the Steamship "Fort Morgan" represented the Gulf Coast Plantation Company, time-

chartered owner. Respondent did not know the Fort Morgan Steamship Company, Limited, petitioner, in the premises, and had no relations with it, owed it no duty, and was not required to treat with it in any respect in the premises. If it should be held by the Court that respondent was under any obligation, directly or indirectly, to Fort Morgan Steamship Company, Limited, in this respect, then respondent shows that the master of the Steamship "Fort Morgan" consented to the equipping of the steamshipper for the transportation of cattle as aforesaid.

Sixth: In answer to the sixth article of the petition, it is true that, after said cattle were loaded, the ship left port and returned to the port and discharged her cargo. Respondent has no knowledge that would enable it to answer the allegation as to the ship encountering heavy seas and puts petitioner to its proof of this allegation, if material.

Seventh: The allegations of the seventh article of the petition are admitted to be true.

Eighth: Answering the eighth article of the petition, respondent refers to the libel of Armour & Company as to what allegations it contains. Respondent shows that the unseaworthiness of the ship was not attributable, in any sense, to any inadequacy of the ship's equipment for carrying a deck load of cattle, but solely to the unseaworthiness of the ship in respect of her tanks, as alleged in detail in the libel of Armour & Company. Respondent reiterates that it had no relations whatsoever with petitioner, Fort Morgan Steamship Company, Limited, but solely with Gulf Coast

Plantation Company, time-chartered owner, which company has not been made a party hereto.

Under the charter party between Gulf Coast Plantation Company and this respondent, respondent had the right to equip the ship to carry cattle; respondent so equipped the ship, with the permission, acquiescence and authority of Gulf Coast Plantation Company and the Master of the Steamship "Fort Morgan", and this equipment was properly installed and everything was done in that respect in a proper and skillful manner and with good and sufficient material, and the accident re-

64 sulting in the injury to the cattle was not connected with the equipment of the ship for transportation of cattle, but was due solely to the unseaworthiness of the ship with respect of its tanks and other respects not connected with the deck load, as set forth in the libel of Armour & Company.

Ninth: The allegations of the ninth article of the petition are true.

Tenth: In answer to the tenth article of the petition, respondent prefers to let the charterparty between Gulf Coast Plantation Company and this respondent speak for itself.

Eleventh: For answer to the eleventh article of the petition, respondent shows that it is not necessary and proper that this respondent should be made a party defendant in these proceedings. The fact is that, if any party other than the original parties to the proceedings should be impleaded, it should be Gulf Coast Plantation Company and not this respondent, as this respondent had no relations, by contract or otherwise, with Fort Morgan Steamship Company, Limited.

Twelfth: For answer to the twelfth article of the petition, the allegations thereof are not true.

Thirteenth: For answer to the thirteenth article of the petition, respondent admits the same to be true.

Wherefore, respondent prays that there be judgment in its favor and against Fort Morgan Steamship Company, Limited, dismissing the petition as against this respondent, and for all costs of Court, and general and equitable relief.

(Signed) . TERRIBERRY, RICE & YOUNG,  
Proctors for Respondent.

65      State of Louisiana,  
          Parish of Orleans,  
          City of New Orleans.

George H. Terriberry, being duly sworn, according to law, did depose and say:

That he is one of the proctors for The Central American Cattle Company, Inc.; that the exceptions filed herein are, in his opinion, well founded in law and are not interposed for delay, and that the allegations of the foregoing answer are true to the best of his knowledge, information and belief.

(Signed)      GEO. H. TERRIBERRY.

Sworn to and subscribed before me this 12th day of December, 1918.

(Signed)      W. W. YOUNG,  
Not. Pub.

(Seal)

66      EXCEPTION AND ANSWER OF THE CEN-  
TRAL-AMERICAN CATTLE CO., INC.

Filed December 13, 1918.

United States District Court, Eastern District of Louisi-  
ana, New Orleans Division.

Armour & Company,  
versus No. 15811, In Admiralty.  
Steamship "Fort Morgan".

Now into Court comes The Central-American Cattle Company, Inc., appearing herein solely for the purpose of exception, and excepts to the petition impleading it, on the ground that the said petition fails to set forth a right, under the rules and practice of the Admiralty Court, to implead exceptor, and fails also to set forth a cause of action either in favor of libelant, Armour & Company, or in favor of the claimant, Fort Morgan Steamship Company, Limited, as against exceptor.

Wherefore, exceptor prays that this exception be maintained, and that the petition to implead it be dismissed, and the order of Court thereon be vacated, and, in the alternative, that the exception of no cause of action be maintained and that the libel and the petition as against exceptor be dismissed.

Reserving the benefit of the foregoing exceptions, The Central-American Cattle Company, Inc., for answer to the original and supplemental libel of Armour & Company, shows:

First: The allegations of the first article of the libel are admitted to be true.

Second: Answering the second article of the libel, it is true that, at the times thereafter referred to, and immediately prior thereto, the Norwegian Steamship "Fort Morgan" was engaged as a carrier upon the high seas and between ports and places in different countries, but respondent is without sufficient knowledge or information to enable it to admit the allegation that the Steamship "Fort Morgan" was a common carrier.

Third: The allegations of the third article of the libel are admitted to be true.

Fourth: The allegations of the fourth article of the libel are admitted to be true.

Fifth: The allegations of the fifth article of the libel are admitted to be true, except the allegation as to the positive refusal of the officers and men composing the crew of the vessel to go further, and as to their insistence upon returning with the vessel to the port of departure, and as to their entertaining grave fears for the safety of the vessel and themselves. As to these latter allegations, respondent is without sufficient knowledge to enable it to make admission or denial. Libelant is put to its proof of the truth of these latter allegations, if material.

Sixth: Answering the sixth article of the libel, respondent believes the allegations thereof to be substantially true.



Seventh: The allegations of the seventh article of the libel are substantially true, as respondent believes.

Eighth: The allegations of the eighth article of the libel are substantially true, respondent believes.

Ninth: The allegations of the ninth article of the libel, as to unseaworthiness of the ship, are true, but respondent shows that respondent was without knowledge of such unseaworthiness until after the steamer returned to port Limon. Respondent, at all events,  
68 has no responsibility, as time charterer, for the seaworthiness of the ship, as, under the terms of the charterparty, the Gulf Coast Plantation Company, Limited, time-Chartered owner, was under obligation to maintain the ship in a seaworthy condition. The ship could have carried the deck load of cattle, but for her unseaworthiness in other respects, and, if she had been seaworthy in all other respects, she would have been able to carry the deck load of cattle. On other occasions, previously, the steamer had carried deck loads of live stock and there would have been no difficulty in her doing so on this voyage, but for the fact of her unseaworthiness in respect of her tanks, as set forth in this article of the libel.

Tenth: The allegations of the tenth article of the libel are admitted to be true, but respondent shows that it was not in the province of this respondent, as charterer, to direct the master as to where coal should be stowed. The Master of the vessel was the only person in authority to control this aspect of the matter and it was his duty and not the duty of this respondent to care for the seaworthiness of the ship, as to her ballast, tanks and seaworthiness.

Eleventh: For answer to the eleventh article of the libel, it is admitted that libelant did suffer damages, but this respondent has no knowledge of the extent thereof. In any event, this respondent was not responsible for such damages, as the damage resulted from the unseaworthiness of the ship and not from any neglect or fault on the part of this respondent.

Twelfth: For answer to the twelfth article of the libel, respondent believes that the allegations thereof are substantially true, except as to the amount of damage. This respondent is without sufficient knowledge of the extent of the damage suffered by libelant to enable it to admit or deny the allegations in that respect, and puts libelant to its proof, if material.

69       Thirteenth: For answer to the thirteenth article of the libel, the allegations thereof are as to pleadings and legal rights and not as to facts and respondent leaves the pleadings and the law to speak for themselves. In any event, respondent is not liable for the damages sustained by libelant and has no interest in the measure thereof.

Fourteenth: For answer to the fourteenth article of the libel, respondent admits the jurisdiction of the Court and shows that all and singular the premises of this answer are true.

First: Answering the first article of the supplemental libel, respondent is without sufficient knowledge and information to enable it to admit or deny the statements contained in the Exhibits referred to.

Second: For answer to the second article of the supplemental libel, respondent admits the genuineness of the live stock contract annexed and marked Exhibit D.

Third: The allegations of the third article of the supplemental libel are true.

Wherefore, the premises considered, respondent prays that the libel of Armour & Company as against this respondent, be dismissed, and for all general and equitable relief and costs of Court.

(Signed)

TERRIBERRY, RICE &  
YOUNG,

Proctors for Central-American  
Cattle Company, Inc.,  
Exceptor and Respondent.

70 State of Louisiana,  
Parish of Orleans,  
City of New Orleans:

George H. Terriberry, being duly sworn according to law, did depose and say:

That he is one of the proctors for the Central-American Cattle Company, Inc., that the Exceptions filed herein are, in his opinion, well founded in law and are not interposed for delay; and that the allegations of the foregoing answer are true to the best of his knowledge information and belief.

(Signed)

GEO. H. TERRIBERRY.

Sworn to and subscribed before me this 12th day of December, 1918.

(Seal)

(Signed)

W. W. YOUNG.

November Term, 1918.

Court met pursuant to adjournment.

Armour & Company,  
vs. No. 15,811.  
Steamship "Fort Morgan."

Present:

George H. Terriberry, proctor for the Central-American Cattle Co. Inc., exceptor;

Victor Leovy, proctor for the Fort Morgan Steamship Company, Ltd., claimant of the Steamship "Fort Morgan";

Proctor for Libelant being absent:

and was argued by the Proctors for the respective parties:

Whereupon, and on due consideration thereof, it is ordered by the Court that the said exceptions herein be, and the same are hereby, overruled.

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72      MOTION AND ORDER TO SHOW CAUSE  
WHY CASE SHOULD NOT BE SET  
DOWN FOR TRIAL.

Filed Feb. 19, 1920.

District Court of the United States for the Eastern  
District of Louisiana, New Orleans Division.

Armour & Company,  
vs. No. 15,811, In Admiralty.  
Steamship Fort Morgan.

Now comes John D. and M. A. Grace, proctors for  
libelant and shows the Court,

That in the above entitled and numbered cause the  
libel was filed January 24, 1918; thereafter, certain  
proceedings were had with respect to exceptions to the  
libel to the supplemental libel, etc.

That libelant took testimony on February 20, 1919;  
and formally notified respondent on July 31, 1919, that  
they closed, reserving the right to produce rebuttal tes-  
timony if deemed necessary.

That claimant of the S. S. Fort Morgan took testi-  
mony on the 18th day of September, but down to the  
present time has done nothing further.

Appearers further show that libelant desires to have this case tried at an early date.

It is therefore, ordered that claimant and respondent show cause on Saturday, February 21st, why this case should not be set for trial on the evidence and exhibits taken and offered by the respective parties on date to be named by the Court.

### 73 HEARING AND SUBMISSION OF CAUSE.

Extract from the Minutes.

November Term, 1921.

New Orleans, Wednesday, February 1st, 1922.

Court met pursuant to adjournment;

Present: Hon Rufus E. Foster, Judge.

Armour & Company,	
vs.	No. 15,811.
Steamship "Fort Morgan."	

This cause came on this day to be heard upon the pleadings, exhibits, testimony and proofs as specified in the notes of evidence offered on behalf of the respective parties;

Present:

John D. Grace, proctor for libelant;  
 Victor Leovy, proctor for claimant;  
 William W. Young, proctor for Central American  
 Cattle Co., Intervener;

and was argued by the proctors for the parties in interest and submitted, when the Court took time to consider.

## 74 NOTE OF EVIDENCE FOR LIBELANT.

**Filed February 1, 1922.**

## The Law.

United States District Court, E. District of Louisiana.  
Honorable Rufus E. Foster, Judge.

Armour & Company,  
vs. No. 15,811.  
Steamship "Fort Morgan."

### Note of Evidence for Libelant.

Libelant offers in evidence the following depositions and exhibits:

Deposition of:  
Victor H. Munnecke  
Ed. J. Mitchell.  
A. G. Frisbie.  
W. C. Kirk.

And the following Exhibits:

All exhibits offered in evidence by libelant at and during examination of witnesses for Libelant, Claimants and Respondents on Petition to bring in third parties, including Libelant's exhibits D1, D2, D3, D4, D5, D6.

Radiograms sent by Master of Fort Morgan and message received by him, original bill of lading, report of surveyors, etc.

(Signed) JOHN D. & M. A. GRACE,  
Proctors for Libelants.

75 DEPOSITIONS ON BEHALF OF LIBELANT.

Filed February 1, 1922.

District Court of the United States for the Eastern  
District of Louisiana, New Orleans Division.

Armour & Company,  
vs. No. 15,811 In Admiralty.  
Steamship Fort Morgan.

The depositions of Victor H. Munnecke, Ed. J. Mitchell, A. G. Frisbee and W. C. Kirk, taken on behalf of the Libelant, before Frederick Julian, a Notary Public of Cook County, Illinois, Thursday, February 20, 1919, at the offices of Armour & Company, Union Stock Yards, Chicago, Illinois, pursuant to notice.

Messrs. John D. and M. A. Grace,

By John D. Grace, Esq.,

Appeared for Armour & Company;

Messrs. Denegre, Leovy & Chaffe,

By Victor Leovy, Esq.,

Appeared for the Fort Morgan Steamship Company;

Messrs. Terriberry, Rice & Young,

By W. W. Young, Esq.,

Appeared for the Central-American Cattle Company, Incorporated.



76

## STIPULATION.

It is hereby agreed by and between counsel for the Fort Morgan Steamship Company, Mr. Victor Leovy representing Messrs. Denegre, Leovy & Chaffe, Proctors, and by counsel for the Central-American Cattle Company, Incorporated, Mr. W. W. Young representing Messrs. Terriberly, Rice & Young, Proctors, and by counsel for Armour & Company, Mr. John D. Grace representing Messrs. John D. and M. A. Grace, Proctors, that these depositions may be taken down in shorthand; transcribed by the reporter,—the signing, sealing and certification to be waived; and that four carbon copies shall be made, one for each of the counsel interested in the case; all to be taxed as costs.

77

VICTOR H. MUNNECKE, called as a witness on behalf of the Libelant, having been first duly sworn, testified as follows:

## Direct Examination.

By Mr. Grace:

Q. Mr. Munnecke, are you identified with Armour & Company, the Libelant in this case against the Steamship Fort Morgan?

A. I am.

Q. What is your connection with the Company?

A. Manager of the Dressed Beef and Live Cattle Department.

Q. How long have you been so identified with this Company, the Libelant?

A. Six years.

Q. What is the nature of your duties in that employment?

A. To provide livestock which I convert into dressed beef and distribute and sell.

Q. In that capacity and in line with your duty, on behalf of Armour & Company, did you make purchase of any cattle, or an agreement for purchase of any cattle, down in Central America?

A. I did.

Q. With whom?

A. With the Central-American Cattle Company.

Q. As a result of any contract or agreement that was made did the Central-American Cattle Company deliver any cattle for the account of Armour & Company?

78 A. They delivered them to the steamer, if that is what you mean. They did not complete delivery. We contracted for the delivery of these cattle at Jacksonville, Florida. They delivered them to the steamer at Port Limon.

Q. To what steamer?

A. The Steamer Fort Morgan, at Port Limon, Costa Rica.

Q. And how many head of cattle were delivered to that steamship, the Steamship Fort Morgan?

A. Approximately 420.

Q. As an evidence of the shipment of that cattle on board that steamship, do you recognize this as the bill of lading that was given (handing document to the witness)?

A. I have seen that some place.

Mr. Grace:

A copy of that is attached to the libel of Armour & Company in this suit. That is the original.

The original is offered in evidence on behalf of the Libelant for purposes of showing the receipt of the cattle on board said steamship, and for identification in this case is marked by the Commissioner Libelant's Exhibit A-1.

(Whereupon said document was marked "Libelant's Exhibit A-1", and will be produced by Mr. Grace at the trial of this cause.)

79 Q. After these cattle were delivered on board, the 420 head you mention, on board the Steamship Fort Morgan, was the freight paid for the transportation of those cattle over to Jacksonville, Florida?

A. It was not paid at that time.

Q. It was paid after they were on board of the vessel?

Mr. Leovy:

Now, please.

Mr. Grace:

Q. Was it paid after they were loaded on board the vessel?

A. No, sir.

Q. I do not mean immediately after, but I mean a time subsequent to the loading on board the vessel.

A. No.

Q. As a matter of fact, has the freight been paid?

A. Well, the freight—it was not paid, no; but it was later settled by compromise agreement with the people with whom we contracted for the cattle.

Q. And did that settlement include the payment of the freight?

A. Yes, sir, it included the payment of the freight, yes.

Mr. Leovy:

Q. May I ask was that settlement in writing?

A. What is that?

Q. Was that settlement in writing?

A. Well, the new contract is in writing.

Q. The contract of settlement?

A. Well, I do not know that it specifically  
80 mentions the freight, but then it was one of the  
considerations when we made the new contract  
when we settled for a lump sum.

Mr. Leovy:

I would like to have whatever contracts you made in writing.

Mr. Grace:

Q. What was the rate of freight that was agreed upon for the transportation of cattle from Port Limon to Jacksonville, Florida?

A. \$25.00 per head.

Mr. Leovy:

That is objected to on the ground that the written contract has been pleaded and speaks for itself.

Now, I do not want to break you up with unnecessary objections, and I would suggest that I put in there an agreement that all the objections which are made in our answer, and objections that parol evidence is not admissible to vary the contents of these written agreements, be considered as made to all the testimony that is to be taken here, without the necessity of repetition.

Mr. Grace:

That is, the particular exceptions that you have designated now. You see you say all of the objections reserved in your answer. Now, I would rather you would specify the particular ones.

Mr. Leovy:

The answer contains a number of references—I think about a dozen—to different clauses of the bills of lading.

81 Mr. Grace:

Then the reservation you are speaking of is—

Mr. Leovy:

With regard to the exceptions and objections that are made in the answer.

In order to state fully what I mean, I desire to object to any testimony tending to contradict or vary the provisions of the contracts that have been filed in evidence, including the bill of lading, and to any testimony to prove damages other than as provided for in said contracts, and to any testimony to prove indirect or remote damages; and I suggest that it be considered that such objections be made to this testimony, without the necessity of repetition, it being understood, of course, that by objecting to any particular kind of proof of damages I do not admit that any damages are due.

Mr. Grace:

The suggestion is adopted insofar as it relates to the bill of lading, that being the only contract at this time that has been offered in evidence.

Mr. Leovy:

I mean that have been filed; that have been filed as a part of the pleadings.

Mr. Grace:

It is agreed that the general objection shall stand without the necessity of specially objecting to the questions and answers as propounded. That is what you wanted.

Mr. Leovy:

Meaning by the "general objection" that just above dictated by me? \*

82 Mr. Grace:

Yes.

Mr. Leovy:

That is all right. It is just to save you time and trouble.

Mr. Grace:

Q. As a matter of fact, Mr. Munnecke, were the 420 head of cattle which were shipped on board of the Steamship Fort Morgan delivered to Armour & Company?

A. No.

Q. It appears that the Steamship Fort Morgan left Port Limon with the cattle on board, proceeded to sea a certain distance and returned for some cause. When she returned do you recall whether or not any of the cattle had been killed?

A. It was reported to me that some 200—

Q. 200 head of the cattle which had been shipped—

A. —were killed.

Q. That they had died as a result of the vessel listing heavily over to one side?

Mr. Leovy:

I object to the question as leading.

Mr. Grace:

Q. What was the nature of the report?

Mr. Leovy:

I object to that as hearsay.

Mr. Grace:

Q. And when I speak of the report I mean a report made to you in due course by representatives of the firm at the scene.

Mr. Leovy:

I still object as hearsay.

A. I received reports from two men, one Mr. Edward Mitchell and the other Mr. Edward Wilkinson,  
 S3 and they were substantially the same in that they stated the vessel had put out with this 420 odd cattle aboard, and in the course of three or four hours had returned, and they were told by the different members of the ship's crew that the vessel had listed to port to such an extent as to cause these animals to fall over on one another and up against the side of the pens and become suffocated, and a superficial examination revealed evidence of the fact that there were some two hundred cattle killed in that manner.

Mr. Grace:

Q. Did Armour & Company pay for those two hundred head of cattle?

A. Not at that time.

Q. No. I mean at any time, of course?

A. We did.

Q. Yes. Did you pay the \$25.00 per head freight on those cattle?

A. Yes.

Q. You have mentioned two persons there, Mr. Wilkinson, for instance, one. He was what?

A. Supercargo.

Q. I understand Mr. Wilkinson is dead now.

A. He died in Washington during the "Flu" epidemic.

Q. That would be last fall?

A. Yes; October or November.

Q. And Mr. Mitchell, he is here present?

A. He is here today.

84 Q. He is here in the building?

A. Yes.

Q. Did Armour & Company have anything to do with procuring the Steamship, or crew or equipment or fittings, or anything of that sort, relating to the vessel itself?

A. No.

Q. What character of vessel did Armour & Company require should be furnished for the purpose of transporting the cattle?

A. A vessel that would—a vessel suitable for the work and one that would grade "Lloyd's A-1" or better.

Q. What was the weight of the cattle, Mr. Munnecke, that was shipped on board of the Steamship Fort Morgan?

A. 320,400 pounds, I believe.

Q. I have a memorandum of 346,000.

A. Well, that is what it was. Three hundred, whatever it was. 346,302 pounds, live weight.



Q. What was the contract price for that cattle?

A. Five cents per pound for all cattle weighing 800 pounds and upwards, f. o. b. Limon.

Q. That was to be paid to the Central-American Cattle Company?

A. Yes, sir.

Q. I say, that was to be paid to the Central-American Cattle Company?

A. Yes, sir; that was the buying price.

Q. And that was to be paid over and above  
85 all your overhead expenses down there?

A. Yes.

Q. What was the value of that cattle delivered at Jacksonville, Florida?

Mr. Leovy:

Objected to for the reasons stated in the general objection, and because the witness had not been shown to be familiar with the facts and circumstances on which an opinion as to the value of cattle at Jacksonville would be based.

A. \$75.00 a head, Jacksonville, Florida.

Mr. Grace:

Q. I understood you to say in your direct examination that you have been connected with Armour & Company at the head of the buying department of cattle for how long? Seven years?

A. Six years.

Q. Six years. And in that connection did you have anything to do with buying cattle at Jacksonville, Florida?

A. Yes, sir. I have direct supervision over the operations of our plant at Jacksonville, Florida.

Q. I understood in your direct examination that you were at the head of that department with regard to purchases generally?

A. All over the world.

Q. It appears by the pleadings filed in this  
86 case, wherein reference is made to a suit brought by the Central-American Cattle Company against Armour & Company in the Federal Court, Parish of Orleans, Louisiana, that there is a dispute between the Central-American Cattle Company and Armour & Company concerning certain sums of money which Armour & Company, they contended, was obligated to pay them.

As a matter of fact, was the difference between Armour & Company and the Central-American Cattle Company, insofar as the claims of the Central-American Cattle Company for payment of the cattle and freight as set up in that suit are concerned, adjusted between you and the Central-American Cattle Company—your Company and the Central-American Cattle Company?

A. As regards payment of the cattle, they were settled.

Q. And the payment of the freight on the 200 that were lost, that was settled, was it?

A. Yes, sir.

Q. Yes. And with regard to the cattle which were discharged from the vessel and afterwards able to take a pasture, was any arrangement made between yourself and the American Cattle Company respecting them?

A. Regarding the title to them?

Q. Yes.

A. Ownership of them?

Q. No. Particularly with respect to the care of them and as to what should be done with them.

87       A. They were to supervise—agreed to supervise the care of those cattle, and when they had recovered from their injuries they were to put them aboard the steamer—the subsequent steamers that we expected to load for Jacksonville, Florida, and they were to participate in the equity.

Q. In other words, the benefits of profits that might be derived?

A. Yes.

Q. As a matter of fact, did the Central-American Company subsequently make any shipments out of that lot of cattle to Armour & Company?

A. Yes, sir.

Q. How many head?

A. 59 head.

Q. And what was the value of that cattle as delivered at Jacksonville, Florida?

A. About the same as the others, I should say.

Q. About \$75.00?

A. \$75.00 per head, although there were evidences of internal bruises that depreciated the carcass meat out of these animals when we came to merchandise it, but we never can tell how much that is because we don't follow it through. You have to follow it through right to the retailer almost to determine what that damage was. An ulcer or bruised kidney or bruised back, or something like that. We sell it to the wholesaler and he takes a gambler's chance on it.

88       Maybe we have to discount it and maybe we don't have to discount it so much, depending on the condition of the market on the day it was sold.

Q. With regard to the remaining head of cattle, what disposition was made of them?

A. We finally sold those to the United Fruit Company. Received a bid by cable from them and accepted it.

Q. At how much a head?

A. \$20.00 per head, less certain expenses. I do not know whether—I think the statements will show what that is. We had some expense off of that, I believe.

Q. When you speak of expenses, were there any expenses incurred in the upkeep, feeding and attending to those cattle?

A. Yes, sir.

Q. It is expenses of that nature, is it, that you are referring to?

A. Yes; no overhead. We held our man there for sometime.—Mitchell. We didn't charge any of that against those cattle.

Q. Do you know what was the cost and expense of holding those heads of cattle that were put out on pasturage, those that were taken off of the Steamship Fort Morgan?

A. I think Mr. Kirk has statements to show that.

Q. Of your own personal knowledge, do you recall what the gross amount was?

A. Well, yes. I think it was \$1,400.00.  
89 Wasn't it, Mr. Kirk?

Q. You do not know definitely, do you?

A. No.

Q. What was the reason that the cattle brought only a matter of \$20.00 a head?

A. Because they were in poor condition, and a narrow market for them; only one outlet, which was local slaughter or resale to buyers from the Canal Zone, thus putting them in competition with South-American cattle that were taken into the Canal Zone; but principally because of their poor condition.

Q. And that poor condition induced by reason of what?

A. Of injuries suffered on this vessel.

Q. And by this vessel you mean the Steamship Fort Morgan?

A. The Steamer Fort Morgan.

Q. Do you recall the number of head that was actually discharged from the Steamship Fort Morgan alive?

A. 208 is the figure I have in mind. Eight of those died within a few days or two or three weeks, and another one died later; and then there were fifty shipped, and that would leave 149, which was the number sold at \$20.00 per head.

Q. And the cattle that died died from what cause?

A. From internal injuries.

Q. Sustained where?

A. Sustained on the Steamer Fort Morgan.

90 Mr. Grace:

That is all.

#### Cross-Examination.

Mr. Leovy:

Q. Mr. Munnecke, in testifying about the agreements and arrangements that have been made I take it that you refer to the two agreements which your counsel has filed of record, with the supplemental libel, being two livestock contracts, one of which, I believe, is dated October 3, 1917, and the other November 29, 1917, is that correct?

Mr. Grace:

I object to the form of the question. We have not filed two livestock agreements. We have filed, as an-

nexed to the libel, as evidencing the shipment of the cattle, a bill of lading, and subsequently filed, on call from the defendants, a livestock agreement dated the 29th day of November, 1917; but have not at any time filed or made any part of our pleadings any contract under date of October 3, 1917.

Mr. Leovy:

Q. Then, Mr. Munnecke, I will amend the question. It is a matter of utter and absolute indifference to me who filed these contracts.

I take it in speaking of what has been agreed upon with respect to the shipment of this cattle you are referring to an agreement of November 29, 1917, 91 filed by your counsel and a memorandum of agreement made on October 3, 1917, between the Central-American Cattle Company, Incorporated, and Armour & Company, is that correct?

Mr. Grace:

We object to any and all testimony referring directly or indirectly to the contract of October 3, 1917, as having no part or place in this litigation, and while counsel for the Claimant may not be concerned as to who files or may not file them the Libelant in this case objects to the introduction of them in evidence.

Mr. Leovy:

I desire in this connection to call attention to the fact that the memorandum of agreement of November 29, 1917, refers to freight as per contract, and that the bill of lading also refers to the livestock contract by a stamp on its face.

Mr. Grace:

I submit that upon the effort of counsel to secure from the Libelant the contract of October 3rd, when the livestock contract of the 29th of November, 1917, was filed, that he was unable to get an order from the Court requiring the production thereof.

The Witness:

You want to know whether what I said here is covered—

Mr. Grace:

Better read the question.

(The pending question was read.)

A. I referred only to the original contract.

Mr. Leovy:

Q. Of what date?

A. Of October 3rd. Whatever date that is  
92 in October.

Q. Yes. Well, why?

A. Because that is carrying the cattle up to the point of putting them aboard the steamer. What differences we have had after that, and how we settled them, is covered by another agreement.

Q. What was the agreement made on October 29, 1917? Didn't that relate to the carriage of this particular shipment of cattle?

A. I do not know what that was. October 29th?

Q. I do not mean October 29th. Will you correct that? An agreement of November 29, 1917. That is the one which your counsel filed. I confess I, myself, am unable to understand why that was made describing this

shipment to be made on November 29th, whereas the bill of lading is dated November 28th? Do you understand that?

A. No, sir. Mr. Mitchell may be able to explain that. I can't.

Q. I want to call your attention to the fact that in your supplemental libel filed by your counsel it is stated, in Article 2, that the livestock contract referred to in the bill of lading, attached to the libel as a part thereof, is as "per Exhibit D, which is hereto attached and made a part hereof."

I also want to call your attention to the fact that the bill of lading is dated November 28th, as I recall it, whereas the memorandum is dated November 29th.

Do you understand it? I am simply asking for an explanation.

A. No, I do not.

Q. I do not. Do you know anything about this contract that was made on November 29th at all?

A. No.

Q. I notice that it was signed by Mr. Mitchell. I suppose he was the one that attended to it.

(No answer.)

Q. At any rate, you know nothing of any other agreements, do you?

A. I know something of other agreements we made with the Central American Cattle Company.

Q. You mean subsequently?

A. Yes, subsequently.

Q. You know you stated once or twice in your direct examination, for instance, what kind of boats you expected, and what you had agreed to, and so on, and I



didn't care to ask at the time whether all that was covered by writing, but, I take it, you were referring to this contract, were you not?

A. Yes, the first contract.

Q. The first contract, yes.

A. Yes.

Q. Now, then, after this shipment was made and the stuff was returned, let us try to get, as a matter of dollars and cents, what you actually paid out. You say you paid this or that for the cattle or for  
94 freight. Up to the time of the shipment of this cattle you hadn't paid a cent to the American Cattle Company, or anything at all, had you?

A. No, sir.

Q. How much have you paid them since, and when?

A. Paid them \$19,000.00 in January, in a lump sum.

Q. \$19,000.00 in January?

A. That is, we agreed in January to pay it, subject to certain other obligations on their part.

Q. How much have you paid them?

A. We have now paid them that sum. We subsequently paid them the entire sum.

Q. When did you pay them that sum?

A. When they re-engaged in the business of shipping cattle on other steamers.

Q. All that was upon agreements and arrangements which you made with them, was it?

A. Yes, sir.

Q. Were those in writing?

A. Yes, sir.

Q. Have you a copy of that?

A. I think Mr. Kirk has.

Q. Will you produce it?

Mr. Grace:

Q. Does that contract relate solely and exclusively, Mr. Munnecke, to a matter of just simply the settlement of the price that was paid for the cattle and freight, or does it go into other contracts and other matters?

A. I said certain other obligations, other matters required of them; and one of which was an inducement to get them to re-engage in the cattle shipping business.

Mr. Leovy:

Q. In other words, the \$19,000 was not paid solely and exclusively on account of what had happened, but also as an inducement to get them to re-engage in the cattle business, is that correct?

A. It was paid in settlement of our contract.

Q. And partly, as you have just said, as an inducement to get them to go on into the cattle business and perform certain other obligations?

A. Yes.

Q. Is that correct?

A. Yes.

Q. So much so, in fact, that you didn't actually pay the money until those obligations, whatever they were, had been performed, is that correct?

A. Correct.

Q. Now, I will ask you if you will produce a copy or an original of that agreement?

Mr. Grace:

Yes, we will produce a copy of it.

Mr. Leovy:

May I see it now?

(Mr. Grace thereupon handed Mr. Leovy the document in question.)

96 Mr. Leovy:

I offer the agreement in evidence for the purpose of showing that the damages claimed in the libel were not sustained, and that the statements made in the libel in that regard are not correct. It is marked "Deft. Chicago 1."

Mr. Grace:

We, while having no objection to the introduction of the document itself, join issue with counsel with respect to his declaration as to what the contract shows and does not show.

(Whereupon said document was marked "Defendant Chicago 1," and is hereto attached and hereby made a part of these depositions.)

Mr. Leovy:

Q. Now, you state that \$19,000 was paid by Armour & Company.

A. Eventually.

Q. Eventually. And that is the total amount that was paid? You never did pay more than \$19,000 with regard to this entire matter, did you?

A. Well, in addition to that we paid for the care of these cattle.

Q. Oh, yes. I had forgotten that.

A. Yes.

Q. I didn't mean, of course, to overlook that. We will come to those detailed items later on. Now, how much of this cattle was sold?

97           A. There were fifty of them shipped to Jacksonville on a subsequent steamer.

Q. And sold for how much?

A. Well, we paid freight on those; paid full freight on the fifty that we shipped over.

Q. How much did Armour & Company get out of that?

A. We got whatever those cattle were worth at Jacksonville.

Q. Well, I do not know.

A. About \$75.00 per head.

Q. To whom did you sell them?

A. Scattered them, distributed them through our branch house organization.

A. Sold them for \$75.00 a head?

A. No, I couldn't say that. We couldn't identify those particular cattle. They were loaded on a steamer with some three or four hundred more. They became part of the drove, and the drove sold at approximately \$75.00.

Q. Do you mean those cattle were sold on the hoof, I think the statement is?

A. No, sir.

Q. They were butchered, slaughtered?

A. Butchered by us.

Q. Then how do you get at what they sold for?

A. Our account shows about what we sold the whole drove of cattle for.

98           Q. Oh, you mean by that your profits for selling the meat, after deducting your expenses, is that correct?

A. Yes, that would be a fair way to express it, I think.

Q. That is one way to put it?

A. Yes.

Q. It doesn't matter how you put things, just so we have the figures correctly. We can argue about that afterwards.

Then the meaning of that \$75.00 valuation is that you could get that much out of cattle by slaughtering them and selling them as dressed meat?

A. Yes, sir.

Q. Even that, is that certain? Before you answer that I want to call your attention to the clause in this memorandum of agreement of October 3rd in which it is said that it is mutually understood and agreed that this contract, being in the nature of an experiment in shipping Central-American cattle in to the United States,—that if, after the shipment of 1,100 head of cattle by first party, it is determined by either party that the arrangement is unprofitable or impracticable either party may have the option of cancelling the contract, and so on. Then it was rather uncertain at the time of making that contract whether you would make a profit or not, is that correct?

A. There was doubt on both sides as to  
99 whether we would be able to carry on the business profitably.

Q. Then it was also subject to a certain bill becoming a law, and the ability to comply with governmental restrictions and regulations. Did the bill become a law, and were you able to comply with those restrictions and regulations?

A. We were.

Q. And the bill did become a law?

A. Yes, sir.

Q. What bill was that?

A. Admitting Central American cattle into the United States.

Q. Now, I think I understood you to admit—if I am not right, correct me—that the business was at that time uncertain. That is, as to whether it would be profitable or not?

A. When the contract was made?

Q. Yes; in October.

A. Yes.

Q. Well, it hadn't become certain by November, had it?

A. Yes, it had.

Q. By what way?

A. It had become decidedly more certain than in October. For one thing, the bill was passed. That took care of the last clause; and then the demands for beef for war purposes became greater as time went on.

Q. Well, the contract, as I understand it,  
100 in that part doesn't refer to the uncertainty about the bill, because it says that it was in the nature of an experiment in shipping, and that if after the shipment of a certain number it should be determined that it was unprofitable,—so, I take it, they hardly took the contingency about the bill into consideration because you couldn't very well experiment about that, could you?

A. Yes. There was opposition to the bill in every—Texas and Louisiana, and all around, so that it was uncertain.

Q. But you do not really think that means experimenting with the bill, do you?

A. That was just one of the things. If the bill had not passed we could not have brought these cattle into the United States.

Q. I just call attention to the working of that, and that is that it was an experiment in shipping, and the

experiment was to be tried by actual shipment, and I will leave the matter with that.

Now, from this cattle that was shipped into the United States what net profits did you get?

A. I couldn't state.

Q. Doesn't somebody know?

A. I do not think so. In fact, I venture to say that no one knows.

Q. What gross profits did you get?

101 A. It seems to me the way to determine that is what the cattle were worth at Jacksonville.

Q. That might be a way, but I think what they sold for in a litigated matter helps us to determine what they were worth.

A. It would if we identified our individual cattle all through the business, but we do not. They become part of a common stock.

Q. You haven't had much difficulty in stating what the cattle would have been worth if they got there?

A. No, because there is a market, a daily market.

Q. Yet you find a good deal of difficulty in estimating what cattle that did get there were worth.

A. Yes, sir.

Q. Then, I suppose, if all of this cattle had arrived you would be unable to say what they were worth?

A. We could tell you what they were worth the day they arrived in Jacksonville.

Q. Can't you tell about those that did arrive?

A. Yes; I said that they were worth \$75.00.

Q. But you do not know what you got?

A. We can carry you a certain distance and show you what we valued them at when they were converted into beef, and can show you we distributed those to our branch house organization, and what they sold  
102 for in certain places.

Q. On the same basis on which you are figuring that this total shipment would have been worth \$75.00 to you if delivered, you can also figure that those which were actually delivered were worth \$75.00, can't you?

A. Yes; we can show that.

Q. And you got it?

A. Yes.

Q. Did you pay back anything on that account to the Central-American Cattle Company or anybody else?

A. No.

Q. That is how many head? Thirty, did you say?

A. No. There was fifty of those—

Q. Fifty?

A. —of those cattle that had been taken off of the steamer.

Q. That cut down your loss about \$15,250.00 then, didn't it? I mean leaving out the question of these expenses?

A. I do not see how you get that.

Q. You paid back \$19,000.00, and had on hand cattle you say were worth \$3,750.00 which you butchered and disposed of. I do not profess to be an expert accountant. I am just trying to get the facts.

A. Well, we paid freight on those cattle, the fifty cattle, when they were eventually shipped from Limon to Jacksonville.

Q. You paid the freight when they were  
103 eventually shipped?

A. Yes.

Q. That does cut it down. That cuts it down \$2,500.00, if you paid the freight.

A. We also paid the Central-American Cattle Company for their supervision and care of half of those cattle, which was one of the things that we traded upon.



Q. I want to get to that disposition and care later. I am not purposely leaving it out, because I intend to take up that subject later with respect to these bills that have been introduced. We will pass that. I think that covers that subject in a general way.

Now, there were altogether 420 head of cattle, and of those how many were killed and disposed of?

A. 208 is my recollection. Mr. Mitchell's letters will show that.

Q. My understanding from the libel is that the allegations are that there were 420 head, and of these 210 died and were thrown over, and eight died afterwards, making 218, leaving 202 cattle that at any rate are not asserted in the libel to have died.

Now, of these 202 head 50 you have said were shipped subsequently by other boats and freight paid thereon? That is correct?

A. Correct.

Q. And those went to Jacksonville and were  
104 slaughtered. Now, of the remaining 172, what became of them?

A. That wouldn't leave 172, would it, Mr. Leovy?

Q. 152.

A. Well, three of those must have died from January, or from February to July, because when we came to close out our lot we had only 149.

Q. Of the 149, what became of those?

A. Sold to the United Fruit Company.

Q. You say at about \$20.00?

A. \$20.00 a head was the selling price, less care and expenses during the summer, the early summer.

Q. That would be about \$2,900.00, wouldn't it?

A. Yes, sir.

Q. \$2,900.00. You got that money?

A. We divided that with the—

Q. With whom?

A. With the Central-American Cattle Company. We divided the net. Rather, the Fruit Company took \$1,-470.00. The statements show on that. I haven't the figures in mind.

Q. I have no objection to your looking at those statements, even though you didn't prepare them yourself. In fact, I should prefer you should do so. You have no reason to suppose they are not correct, have you?

A. All I did was vote whether we should sell the cattle or keep them. The rest of it was a matter of detail for someone to figure out.

105 Q. Who would handle the detail?

A. Why, Mr. Kirk as much as anyone. I do not know of anyone else who would have anything to do with it.

Q. Those statements about to be handed you by Mr. Kirk are correct, I take it, and I have no objection to your referring to them.

While we are waiting for some figures, you say that these remaining cattle, I think reduced to 149, were sold to the United Fruit Company?

A. Yes, sir.

Q. Where?

A. Port Limon.

Q. Do you know what the United Fruit Company did with those cattle?

A. No.

Q. Isn't the United Fruit Company fairly closely related to the Central-American Cattle Company, Incorporated?

A. I do not know.

Q. Haven't they the same officers and directors, and so forth, to a large extent?

A. I know that Mr. Ellis was a director in both concerns.

Q. And you have no information as to what became of that 149 head of cattle?

A. No, nothing but what is shown on those records and their letters.

Q. Well, the United Fruit Company is not in the slaughter-house business at all, is it? It doesn't kill cattle or butcher them?

106 A. I do not know as to that.

Q. Does the Central-American Cattle Company do so?

A. Not that I know of.

Q. Well, aren't you fairly well posted, as a rule, as to the disposition of that quantity of cattle at as small a place as that?

A. I understood that there were drovers in there at all times buying cattle for shipment to the Canal Zone.

Q. And that is the only market that you know of at that place, other than shipment from that place, is that right?

A. That is the only market, yes. The local demand is nil.

Q. You do not know at what prices the United Fruit Company disposed of this cattle to drovers, do you?

A. No, sir.

Q. I think you haven't yet ascertained—you will when you get these figures—as to whether the Central-American Cattle Company paid you for these cattle in cash or in an adjustment of accounts, or how.

A. They sent us a draft.

Q. For \$2,980.00?

A. No, not that much. They were entitled as a part of this \$19,000.00 lump sum, they had an equity in those cattle that were left behind. They were to get

an equity in whatever the avails were from  
 107 those cattle, and I think those figures will show  
 that we got a very small sum for the twenty  
 head—for the 149 head, I mean.

Q. The 149 head had been at pasture for how many months at that time?

A. I think they were sold in July.

Q. You had paid for this cattle at the rate of about a little over \$40 a head, I think?

A. Yes.

Q. Or you were to pay for them under the contract?

A. Yes.

Q. And you think that this 149 head has been reduced in value, I take it you claim, to \$20.00?

A. They told us so, and we had no way of knowing otherwise.

Q. Who told you so?

A. The United Fruit Company agents.

Q. They were the buyers, were they not?

A. Yes, and the only buyers down there, too.

Q. They were not likely to be enthusiastic, were they, as to the condition of the cattle?

A. Perhaps not.

Q. Did you continue the business of bringing cattle from that port to the United States?

A. We carried—we received four cargoes.

108 Q. You didn't bring these 149 head over in those cargoes?

A. No. We brought none of the cattle that were unloaded from the Steamer Fort Morgan on the first boat, but on the second boat we brought fifty, and on the third boat—well, anyway, on one boat we brought fifty head, and for some reason there were none shipped on the other boats. Either they were not in condition,

or there was more fresh cattle brought down from the country—there was sufficient fresh cattle brought down from the country to make a cargo.

Q. What were you paying for these cattle you actually brought there at that time?

A. We paid five cents a pound; the same price, except we paid a higher freight rate on one of the two steamers that was put in the service, each of which made two trips.

Q. But you were buying cattle at \$40 a head and selling it at \$20?

A. Yes, very true; exactly so.

Q. You do not know why those cattle were not brought over to Jacksonville and slaughtered, except you surmise the condition?

A. Yes, that is true.

Q. And your surmise comes from information furnished by the buyer, the United Fruit Company?

A. Not altogether. We had our man there  
109 when the boats were loaded, and in his judgment the cattle were not able to go.

Q. Who was your man?

A. Edward Mitchell.

Q. Was he the supercargo?

A. No.

Q. Who was the supercargo?

A. Edward Wilkinson.

Q. Who was it you had down there all the time those cattle fittings were being put in? Mitchell or Wilkinson, or both?

A. We had Wilkinson on the boat. That is when the cattle fittings were put in, when the boat was en route from New Orleans to Port Limon. It wasn't our job to put them up.

Q. Did you have insurance on this cargo?

A. We had certain insurance. I do not know what the clauses were. The head of our Insurance Department can answer that better than I can.

Q. You were not down there at any time?

A. No, sir.

Q. You were in Chicago the whole time?

A. Yes.

Q. Now that you have the figures, I would be glad if you would give me a statement on those questions I have been asking you as to sales, and so on.

A. You want to know what we paid for the  
110 fifty cattle that we loaded on this steamer, the  
fifty odd cattle that were in the disaster?

Q. Perhaps I had better put it this way: I want to know everything that you put in.—your Company put in.

A. Yes. Well, we settled for a lump sum of \$19,000, and we took ownership in the entire cargo of Fort Morgan cattle.

Q. Well, that is provided for in your agreement, that point, and so I do not know that it is necessary to go into that.

A. Yes.

Q. I simply want to know what you paid. I want a bookkeeper's statement, if you do not mind.

A. In addition to that we paid the contract price for 25 of the fifty cattle.

Q. How much was that that you paid?

A. Five cents per pound, and I think they weighed right at eight hundred, which would be \$1,000 for the 25. That would make twenty-thousand we had invested.

Q. Yes.

A. In addition to that we paid the freight on the fifty cattle we shipped.

Q. That is how much?

A. \$1,250.

Q. \$3,750, I think.

A. No; the freight is \$25 a head. On fifty cattle that would be \$1,250.

Q. \$1,250.00?

A. Yes, sir. And then we paid for expenses,  
111 care of these cattle, \$1,041.91—

Q. All right, sir.

A. —making a total of \$22,291.91. On the credit side you have fifty cattle valued at \$75.00 a head, Jacksonville, or \$3,750. Our share of the net avails our of those 149 cattle which were sold at \$20 per head over there gave us \$1,490.00.

Q. Making a total of how much on the credit side?

A. Making a total of \$3,240.00, and a net of \$17,051.91.

Mr. Leovy:

That is all.

#### Cross Examination.

By Mr. Young:

Q. Mr. Munnecke, the Mr. Mitchell that you state was your representative at Port Limon, is that the Edward James Mitchell that is here today to testify?

A. Yes, sir.

Q. He was your agent down there?

A. No, he was our cattle buyer and representative.

Q. I show you an affidavit which is marked for identification "Central-American Chicago 1," and ask you if you recognize the signature there of Mr. Mitchell (handing document to the witness)?

A. Yes, that is his signature.

Q. Mr. Mitchell states under oath in here  
112 that he is the agent at Port Limon for Armour  
& Company.

A I think it says so; yes.

Q. And you say his position down there was what,  
as I understood it, Mr. Munnecke?

A. He was sent down there as a cattle buyer to act  
as inspector of these cattle, to be our representative.  
He might be construed as an agent.

Mr. Young:

I offer this document in evidence in connection with  
the testimony of this witness.

Mr. Leovy:

For what purpose?

Mr. Young:

For the purpose of showing he stated in this affidavit  
that he was the agent of Armour & Company at Port  
Limon.

(Whereupon said document was marked "Central-Am-  
erican, Chicago 1," and is hereto attached and hereby  
made a part of these depositions.)

Mr. Young:

Q. Now, Mr. Munnecke, I hand you a document  
marked for identification "Central-American Chicago  
2," and ask you to read that document and state what  
it is (handing document to witness.)

A. This is apparently a receipt for 420 head of live  
steers, weight 346,302 pounds, live weight, applying on  
contract between the Central-American Cattle  
113 Company and Armour & Company.

Q. It is dated when?



A. Dated November 29, 1917.

Q. And signed by whom?

A. Edward James Mitchell.

Q. State whether or not the cattle were received in good order on board the Steamship Fort Morgan?

Q. "Received, and accepted, from the Central-American Cattle Company, Incorporated, in good condition, properly loaded on board the Norwegian Steamship Fort Morgan."

Mr. Young:

We offer this in evidence also.

(Whereupon said document was marked "Central-American Chicago 2," and is hereto attached and hereby made a part of these depositions.)

Mr. Young:

That is all.

Mr. Leovy:

That is all.

#### Re-Direct Examination.

By Mr. Grace:

Q. With respect to Mr. Mitchell's agency at Port Limon, what was the extent of that?

A. To inspect these cattle to see that they were physically sound and that they were up to the required weight of 800 pounds per animal.

Q. And to see that they had not been exposed to the conditions that he mentions in there that they were not exposed to?

114

A. Yes, sir.

Q. Now, the purpose and object of that affidavit was what? To satisfy who of what requirements?

A. To satisfy the Central-American Cattle Company that they were entitled to their money.

Q. I am speaking of the affidavit that he made there with respect to the health condition of the cattle.

A. To be sure that they were good healthy animals and would pass Government inspection at Jacksonville.

Q. Is that affidavit required by the Government?

A. The United States Government at the port of entry.

Q. You have spoken of fifty cattle that had been shipped over out of a lot that had been taken off of the Fort Morgan. It is on that fifty that you speak of having paid the entire freight—

A. Yes, sir.

Q. —to the Central-American Company? And in addition thereto having paid so much per pound for so many of them?

A. For one-half of them.

Q. Five cents per pound.

A. Five cents per pound on the actual live weight.

Q. That was over and above the \$19,000.00  
115 that you had paid?

A. Yes, sir.

Q. Both this five cents per pound and the freight?

A. Yes, sir.

Q. Take the 420 cattle which were shipped at Port Limon on board the Fort Morgan in November, 1917, what was the value of that cattle discharged on hoof at Jacksonville, Florida?

A. Somewhere from \$72.00 to \$75.00 per head.

Q. What claim was it that the Central-American Cattle Company had made against Armour & Company on

account of which the settlement was made by Armour & Company with the Central-American Cattle Company?

A. They claimed that they were entitled to their money.

Q. That is, the purchase price of the 420 cattle?

A. Yes, plus the freight.

Q. Plus the freight?

A. Yes, sir.

Mr. Grace:

That is all.

Re-Cross Examination.

By Mr. Leovy:

Q. Mr. Munnecke, were you buying cattle at Jacksonville at that time?

A. I was supervising the buying from here.

Q. Where do you buy them from?

A. We buy them from anyone that drives  
116 them in there to the Stock Yards adjacent to  
our plant.

Q. Is it a stock-raising country around there?

A. Yes.

Q. What were you paying for them?

A. We were paying from five to nine, and in a few  
instances more than that.

Mr. Grace:

Q. Cents per pound?

A. Nine cents per pound; but we were not getting  
many of this particular kind of cattle in that market at  
that time.

Mr. Leovy:

Q. At five cents per pound what would one head of  
this cattle have been worth?

A. Five cents per pound?

Q. Yes; about.

A. You wouldn't buy that kind of cattle at five cents per pound. You said cattle?

Q. Yes.

A. That kind of cattle would have been worth nine cents a pound.

Q. At nine cents a pound what would it have been worth?

A. \$72.00 if they weighed eight hundred pounds.

Q. Did you buy any of that kind of cattle at Jacksonville?

A. I do not think so right at that time. We would have been glad to have got them had they been offered.

Q. There were none there at that time?

A. No, not in any quantity. There might have been a few odd steers.

117 Q. When you speak of cattle being offered,

I take it you mean the cattle that had been driven there—not the cattle which had come in from an ocean trip?

A. No; local cattle.

Q. You mean local cattle?

A. Yes, sir.

Q. Cattle coming in from an ocean trip, are they subject to any disadvantages by reason of that trip at all? Do they lose in weight ordinarily?

A. Not if they have a good voyage and are properly fed.

Q. Suppose they do not have a good voyage?

A. Then they shrink. These cattle showed a shrink, as a matter of fact; that is, the subsequent deliveries of cattle.

Q. Showed a substantial shrinkage?

A. Yes, I think an average of four per cent. In one boat more than that.

Q. By the way, you said in one of your statements here—of course, they were all, I suppose, from loose recollections of these contracts—that you bought these cattle delivered at Jacksonville. I suppose you remember that the language of the contract is “f. o. b.”—what was the name of the port?

A. Port Limon.

118 Q. Port Limon. And I suppose you also remember that you contracted you were to pay freight lost or not lost, and several other things that were of some importance, don't you?

A. The five cents per pound price was f. o. b. Port Limon.

Q. Yes. And also freight not to be returned, lost or not lost, and so forth?

A. That might be on that bill of lading somewhere.

Q. Not in the bill of lading; the contract.

A. I presume we did, if it is in there.

Q. The contract will speak for itself?

A. Yes.

Mr. Leovy:

That is all.

Mr. Grace:

That will be all, Mr. Munnecke.

119 ED. J. MITCHELL, called as a witness on behalf of the Libelant, having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Grace:

Q. Mr. Mitchell, where do you reside?

A. In St. Joseph, Missouri; 806 North 25th Street.

Q. Where are you now employed?

A. I am employed with the Hammond Packing Company, St. Joseph, Missouri; cattle buyer.

Q. Mr. Mitchell, were you representing Armour & Company, the Libelant in this case, in any way, or in their service, during November, 1917, at Port Limon, with regard to the inspection of certain cattle and the shipment of certain cattle from that place to the Libelant at Jacksonville, Florida?

A. I was.

Q. Mr. Mitchell, at the time that the Steamship Fort Morgan arrived at Port Limon during the latter part of November, 1917, where were you?

A. I was in the country the day the steamer arrived.

Q. And came into Port Limon about how long after that?

A. Oh, about two and a half or three hours after the steamer arrived.

120 Q. When she came into port there did she discharge some cargo?

A. She discharged a general cargo.

Q. Was there anyone on board of that vessel who was in the employ of Armour & Company?

A. One man, our supercargo man.

Q. Mr. Wilkinson?

A. Mr. Ed. Wilkinson.

Q. The gentleman who died last fall?

A. Yes, sir.

Q. When the Steamship Fort Morgan came in on that occasion did she have all her cattle pens and fittings, cattle fittings, on the upper deck in place?

A. No, sir.

Q. About how long after her arrival did they commence putting them up?

A. You mean on the upper deck?

Q. Yes, up on the weather deck; that is, the top deck.

A. Well, I think that was about three days after.

Q. Who was it that undertook and directed the putting up of those cattle fittings?

A. Why, Mr. O. R. Whilden, the President of the Central-American Cattle Company.

Q. He was the President of the Central-American Cattle Company, you say?

A. Yes, sir; and the captain of the ship.

Q. And by the captain of the ship you mean  
121 the master of the Steamship Fort Morgan?

A. Yes, sir; and also Mr. Heckman with the United Fruit Company.

Mr. Leovy:

Q. How do you spell that name?

A. Heckman?

Q. Yes.

A. H—e—c—k—m—a—n.

Mr. Grace:

Q. What was his position in the United Fruit Company?

A. He was port captain.

Q. Did Armour & Company through you or anyone else have any supervision or direction or control over the putting up of those fittings?

A. No, sir.

Q. Do you know whether Mr. Wilkinson in any way aided in any part of the work?

A. Only he worked for Whilden. He worked and helped in putting up his fittings.

Q. Was he doing that on behalf of Armour & Company?

A. No, sir.

Q. Did Mr. Wilkinson ask you anything about his going in to aid or assist in the putting up of those fittings?

A. He did. He asked me if it was all right. I told him he didn't have anything to do with that, and I was kind of surprised that he was working, and he  
122 told me that Mr. Whilden was paying him for helping him because the carpenters and good labor was so hard to get down there, and I told him at the time, why, if he could make any extra money by working for Mr. Whilden, why, it would be all right.

Q. But in doing that then he was working for Mr. Whilden of the Central American Cattle Company?

A. Yes, sir.

Q. While that work was going on did you notice whether or not the Master took any part in it,—the Master of the Steamship?

A. Well, when I was on board watching them, why, the captain was around. I saw him one time there telling where to place a post and helping them fix it up.

Q. You say you were on deck there watching them? You mean just out of curiosity?



A. Just being around.

Q. Did you hear the captain of the Steamship Fort Morgan make any comments about the cattle fittings on deck that were being put up?

A. Well, he passed remarks on certain partitions after they would be put up. He would get hold of them and say, "Well, that is all right," and "That ought to hold them." I have heard him pass those remarks.

Q. Did the captain at any time, to your knowledge, in any way disapprove of any of the fittings  
123 that were put up on the deck?

A. No, sir.

Q. Were you there at Port Limon when the cattle were loaded on the Steamship Fort Morgan?

A. I was.

Q. There were some 420 head of cattle loaded aboard?

A. 420 head of cattle.

Q. What was their physical condition?

A. They were loaded in good condition.

Q. Was this bill of lading, which is the original and marked "Libelant's Exhibit A-1," the bill of lading that was given to you by the Master of the Steamship Fort Morgan?

A. Yes, sir, it was.

Mr. Grace:

Referring to the bill of lading that has been offered heretofore in connection with the testimony of Mr. Munnecke.

Q. This form called "Live stock contract" appears to have been signed by Mr.—what are Whilden's initials?

A. O. R.

Q. —O. R. Whilden, on behalf of the Central-American Cattle Company, Incorporated, and by you for Armour & Company. Is that your signature (indicating)?

A. Yes, sir.

124 Q. Who was it asked you to sign that live stock contract?

A. Mr. O. R. Whilden.

Q. Before signing that contract did you have any conversation with the Master with regard to the cattle on board, their condition, and so forth?

A. I did.

Q. What was it you asked the captain and what were his replies to you?

Mr. Leovy:

Objected to on the grounds already stated in the general objection, and on the further ground that the Master is without authority to bind the owners in this regard, or in regard to the erection of cattle fittings, or otherwise, as claimed in this testimony and it is agreed that this objection may be considered as made to all alleged statements of the captain, without the necessity of repetition.

Mr. Grace:

No objection.

A. Why, when loading was completed I went to the captain and I asked the captain what his opinion was of the cargo, and how the boat was loaded, and he told me that everything was just fine, only that he thought that she didn't have her full capacity; that he ought to be able to take more cattle on. That is what he told me.

Q. Did you ask him anything about the fittings that were on deck there?  
125

A. Well, in a general way I asked him about the fittings and the loadings, and he was satisfied with everything connected with the cargo.

Q. And he believed he could have carried even more?

A. Even more cattle.

Q. And to have carried more cattle where would those additional cattle have to have been put?

A. He didn't say about where they could be put, but there were pens, a few pens, that probably could have held a few more cattle.

Q. Those pens were where?

A. Well, they were right on the orlop deck.

Q. Did he ask for any more or insist that he should have more?

A. No.

Q. This contract that I have just shown you, headed "live stock contract," that is the original one—an original that you signed?

A. Yes, sir.

Q. And Mr. Whilden signed?

A. Yes.

Mr. Grace:

In connection with the statement made by the witness on the stand respecting this document, it is offered in evidence and marked "Libelant's Exhibit A-2" for the purpose of identification.

126 (Whereupon said document was marked Libelant's Exhibit A-2, and will be produced by Mr. Grace at the trial of this cause.)

Q. When the Steamship Fort Morgan had the cattle loaded on board, did you call the captain's attention to any condition about the vessel with regard to the way she was standing in the water?

A. I did.

Q. What was it?

A. The Fort Morgan listed to port.

Q. Much?

A. About a few degrees, probably six or seven degrees, something like that; and I noticed when she was being loaded she had a little heavier list, and I spoke to the captain about the list, and he told me that it was all right; that she always had that list, but that after she got out to sea and got under way that she would right herself.

Q. You are not a seafaring man?

A. No, sir.

Q. And you accepted his statement as being true?

A. I did.

Q. As the Fort Morgan left the dock were you standing out there?

A. Yes, sir.

Q. How did she leave? With the aid of a tug or back away?

A. She backed away.

Q. Under her own power?

127 A. Yes, sir.

Q. As she backed away did she retain the same list or straighten up, or take more list?

A. When she backed away she seemed to take a little heavier list when she pushed back.

Q. A little heavier list to port. She left Port Limon at about what time?

A. She left at six o'clock.

Q. In the evening?

A. Yes. That is when she started—got out.

Q. Started on her voyage. That was six o'clock in the evening?

A. That was six o'clock when she was headed out; got out behind the pier.

Q. Six o'clock in the evening?

A. In the evening.

Q. And when did you next see her?

A. Why, I didn't see her after that because I walked in. She got around and started under way and I walked in; went into the lodge. I didn't see her after that.

Q. In other words, she was on her voyage out there—

A. Yes, sir.

Q. —when you walked around to this place you mention?

A. Yes, sir.

Q. After that when did you again see her?

A. I didn't see her again until about 9  
128 o'clock that evening when she came back to port.

Q. What was her condition then?

A. She had a list to port of about anyway from thirty-five to forty degrees, I should judge.

Q. Well, now, will you please state from there on what the things were that you observed about her, and what was done with regard to her, and what the Master did, and anyone else identified with the Port,—what they did in connection with the return of that ship.

A. Why, when this boat—when the Fort Morgan came back into port in a distressed condition she anchored right outside the docks in the shelter of an island there, and she laid there for probably twenty minutes, and there was nobody went out because they couldn't get any boat to go out to the steamer, and the captain of the ship and Mr. Wilkinson came ashore.

Q. Mr. Wilkinson was the supercargo you refer to?

A. This supercargo.

Q. For Armour & Company?

A. Yes. And when they arrived at the dock we got ahold of the captain and Mr. Wilkinson, as there were quite a few people on the dock there, and we thought it would be best to have a little privacy and hold a little meeting and find out what the trouble was, and we went in the United Fruit Company's office, and there was Mr. Whilden, the Central-American Cattle Company, and Mr. Cardova, Mr. Chittenden—he is general manager for the United Fruit Company—and Mr. Doswell of the United Fruit Company, Mr. Heckman, and Mr. Sorensen—he was a pilot down there—and myself.

Q. Did you mention the Master of the ship?

A. Mr. Romagasa, the port captain, and Mr. Wilkinson—he is the supercargo—and Captain Johannesen.

Q. Captain Johannesen was the Master of the Steamship Fort Morgan?

A. Yes. When we were all in there we appointed Mr. Doswell as Chairman, and it was very evident when the captain arrived at the dock that he was—had a little too much liquor in him, and he was asked—

Mr. Leovy:

That is objected to on the ground that there is no such charge in the libel.

The Witness:

(Continuing —what the cause of the trouble was for him to come back to port, and he said that there was nothing the trouble, only that the crew were a lot of school boys, and were afraid to go on, and also that Mr. Wilkinson had asked him to turn back. I then

asked the captain if Mr. Wilkinson was the first one to tell him to turn back, and he said no, that it was the crew that refused to go ahead. Then I asked him if Mr.

Wilkinson was the only one who wanted to  
130 turn back would he have turned back, and he said no.

The captain then asked me what he was to do with the cargo. I told him that as he had left the port and his destination was Jacksonville, Florida, that that would be the only place that Armour & Company could receive these cattle; so it was then decided that Captain Romagasa take charge of this steamer and have her dock and unload it for whoever concerned to save the vessel from being a total loss.

Mr. Grace:

Q. Who was this Captain Romagasa?

A. He is a Government Port Captain at Limon.

Q. All right. Go ahead.

A. So it was decided and that was the way this was handled, he appointing Lloyd's Agent there to look after it.

Q. Captain Romagasa appointed Lloyd's Agent?

A. Yes, sir.

Q. Who was Lloyd's Agent?

A. Mr. Doswell represented them. He was with the United Fruit Company.

Q. Now, as a result of this determination and handling of the matter by Mr. Romagasa and the representative of Lloyd's, what was done?

A. Why, the boat was docked, and there was  
131 200 cattle that were left dead on the boat, and  
220 cattle that were taken off alive. Some of these cattle taken off alive died afterwards.

Q. Do you remember how many died afterwards?

A. I think about nine or ten cattle. I do not remember just exactly.

Q. Before the vessel was moved from the place of her anchorage did anybody go down on board her?

A. Why, we all—there was eight of us started out in a boat and we were going—Captain Romagasa was going to investigate the trouble. When we got to the boat—

Q. Got to the ship, you mean?

A. Got to the ship.

Q. Yes.

A. We stepped out of a rowboat on the main deck of the Steamer Fort Morgan.

Q. That was on what side?

A. On the port side.

Q. You mean you stepped from the rowboat right onto the deck of the Fort Morgan?

A. Yes, sir.

Q. And the other side, the starboard side, how high was that out of the water?

A. That must have been, I should judge, about twenty feet.

Q. About what was the angle of the deck of the Fort Morgan at that time.

A. Angled about forty-five degrees; forty.

Q. Then you say Captain Romagasa stepped out of this small boat, the rowboat, onto the deck of the steamship Fort Morgan, and who else?

A. Romagasa didn't step out.

Q. Who was it?

A. Mr. Doswell, myself and the pilot.

Q. The pilot, what was his name?

A. Mr. Captain Sorensen.

Q. Then what did you note with regard to the conditions around the vessel there?



A. Why, we walked—we got on aft and walked forward, and we looked down in the holds and looked on the deck and saw the cattle leaning against the partitions; but every partition we could see held, and the only thing was the list of the boat.

Q. Do you know why it was that only three out of the boat load went on board of the Fort Morgan?

A. It was a condition that they feared that the boat would turn over any minute.

Q. Did she look that way to you?

A. Yes, sir.

Q. Then she was taken from that mooring, the long dock there, and you say there was a certain  
133 number of the cattle taken off alive. Now, with regard to the cattle that were dead on board, how many were there that were dead on board?

A. Two hundred.

Q. You counted them?

A. I didn't count them.

Q. Did you count the cattle that were discharged?

A. Yes, sir.

Q. So you deducted the live cattle from the sum total of the shipment?

A. Yes.

Q. And that left the 200?

A. Yes.

Q. What was done with the 200?

A. They were buried at sea.

Q. Did you see the ship when she went out with them?

A. Yes, sir.

Q. Coming back with the cattle?

A. Coming back with the cattle.

Q. With respect to the cattle that were discharged from the Steamship Fort Morgan on her return there,

this 220, what was their physical condition as compared with the condition they were in when shipped?

A. Why, they were in bad condition. These cattle were bruised, and lying in the same position so long some of them could hardly stand up when they were unloaded.

Q. What was done then with the cattle that were taken off alive?

134 A. These cattle were taken and put on pasture right outside of Limon until they would be in condition to ship them back into the interior on better pasture.

Q. Do you recall then just what progress was made with respect to the batterment of the condition of those cattle, as to how long a time it took for them to get along a bit? What shipments were made out of them, if any?

A. Why, it took about two or three weeks to get these cattle in shape to be moved back into the interior, and then it took about two months and a half before we could get any cattle that would do to ship.

Q. What was the purpose and object of getting the cattle back to the interior?

A. To get them on better pasture.

Q. There were no suitable pastures in or around Port Limon?

A. No.

Q. Then what was done for the purposes of aiding and assisting these cattle along? What attention was given to them? After you got them in the interior and got them on a better pasturage, then what was done there for them?

A. Why, the United Fruit Company—they went to the United Fruit Company's ranch at Muopolis and were cared for at the United Fruit Company's ranch there.

Q. In other words, they were watered, fed  
135 and attended to that way?

A. Yes.

Q. You were still down there looking after the Armour & Company end of the proposition?

A. Yes, sir.

Q. And the American Cattle Company, I presume, were interested in looking after their interest also in the cattle?

A. Yes, sir.

Q. Finally how many of the cattle were shipped out of that whole lot,—shipped to Armour & Company?

A. Fifty cattle.

Q. And what was their condition when shipped?

A. Their condition when shipped wasn't—while they were in good condition, they weren't in as good flesh as when they were first loaded on the Fort Morgan.

Q. And the remaining number of head there, which appears to have been some 149, what was done with them?

A. Why, I understood that they were afterwards sold to the United Fruit Company.

Q. Do you remember the price that was stated to have been paid?

A. No.

Q. It has been testified in here that the United Fruit Company offered and paid \$20.00 a head for the remaining cattle. What have you to say with respect  
136 to that price for that cattle in their condition?

A. Well, in the condition that these cattle were in I think it was a fair price for them.

Mr. Grace:

That is all.

Mr. Leovy:

In connection with the testimony of this witness and his proving up the contract of November 29, 1918, inas-

much as that contract refers to "freight as per contract", and in view of the testimony of the previous witness, Mr. Munnecke, in order that the complete contract may be shown we offer in evidence, on behalf of the defendant, copy of memoranda of agreement of October 3, 1917, between the Central-American Cattle Company, Incorporated, and Armour & Company.

Mr. Grace:

Which offer is objected to on the grounds that said document is irrelevant, immaterial, incompetent and inadmissible.

(Whereupon said document was marked "Defendant's Chicago 3", and is hereto attached and hereby made a part of these depositions.)

#### Cross Examination.

By Mr. Leovy:

Q. I notice that this contract of November 29th is of that date, and the bill of lading, if I recall correctly, is of November 28th. When was this loading actually completed?

A. On the 29th.

Q. Well, why was the bill of lading dated previously?

A. Why, I didn't—

Q. It is dated previously? That is my recollection. At any rate, this contract was signed before the ship left, I take it?

A. Yes, sir.

Q. Now, was any insurance on these cattle?

A. Well, I do not know what insurance we had on it.

Q. Who attended to the placing of insurance?

A. Mr. Frisbie.

Q. Where is Mr. Frisbie?

A. In Chicago here.

Mr. Grace:

And will be called as a witness in this case.

Mr. Leovy:

That is all.

### Cross Examination.

By Mr. Young:

Q. Mr. Mitchell, did I understand you to say that after the Fort Morgan returned that the fittings were all holding?

A. All that we could see from observing from walking from port to the front part of the ship.

Q. Well, did you see any that were not  
138 holding?

A. No.

Q. Did some of the fittings have to be torn down to get the cattle out, do you know?

A. Yes, sir; that is true.

Q. What condition were those fittings in?

A. Why, I didn't get down in the hold of the boat to unload any of these cattle; only what testimony we had from people that unloaded the boat. All claimed that all fittings were intact.

Q. You stated that Mr. Wilkinson actually assisted in the building of the fittings on board the vessel.

A. He did.

Q. He was being paid by Mr. Whilden, you stated?

A. Yes, sir.

Q. Was he also being paid his usual salary by Armour & Company at that time?

A. Yes, I think he was.

Q. He was representing Armour & Company down there with you, wasn't he, Mr. Mitchell?

A. He was acting as supercargo. He wasn't representing Armour & Company—

Q. What did you personally think about the fittings?

A. Personally?

Q. Yes.

A. Why, from what I saw of them I thought they were all right.

139 Q. Did you find the material all right?

A. Yes, sir.

Q. Were you the agent down there, Mr. Mitchell?

A. Yes, sir.

Q. I show you a document that has been offered in evidence and marked "Central-American Chicago 2", and ask you what that document is (handing document to the witness).

A. That is a receipt that I gave Mr. Whilden for the cattle being loaded.

Q. You acknowledged in that receipt that the cattle were turned over to the vessel in good order?

A. Just whatever it says there.

Q. That is your signature on the receipt?

A. Yes, sir.

Mr. Young:

That is all.

Mr. Grace:

That is all.

140 A. G. FRISBIE, called as a witness on behalf  
of the Libellant, having been first duly sworn,  
testified as follows:

Direct Examination.

By Mr. Grace:

Q. Mr. Frisbie, are you identified with Armour & Company?

A. Yes, sir.

Q. In what capacity?

A. Looking after the marine insurance.

Q. For how long a period of time have you been so identified with the Company?

A. Sixteen years.

Q. With respect to a certain lot of cattle that was shipped on board the Steamship Fort Morgan on or about the 28th or 29th of November, 1917, did you effect insurance on that cattle?

A. Yes, sir.

Q. Have you got the policies with you?

A. Yes, sir.

Q. Would you kindly produce them?

(The witness produces three policies of insurance.)

Q. I notice that these policies are on the Steamship Fort Morgan and/or Steamship Viking.

A. Yes; that is an open contract.

Q. They are to cover shipments made on  
141 either one of the vessels, or both?

A. Yes, sir.

Mr. Grace:

The three said policies are offered in evidence in connection with the testimony of this witness, and I would

ask that in the event of the underwriters calling upon the Libelant to return to them these originals, that copies thereof may be left in the record and the originals withdrawn. They may do it or may not. If they do not, we will not bother with it. These three policies appear to be: One issued by the St. Paul Fire & Marine Insurance Company—

Q. The first policy referred to, the St. Paul Fire & Marine Insurance Company policy, while being dated as of execution or countersigned on the 3rd day of December, 1917, by a rider I notice was made to appear to cover sailings on and after October 2, 1917, on both the Steamers Fort Morgan and Viking?

A. Absolutely.

Mr. Grace:

The next policy is the one executed by the Fireman's Fund Insurance Company, of San Francisco; and the third policy executed by the Automobile Insurance Company of Hartford, Connecticut.

The said policies are, in the respective order in which they have been offered, marked for identification  
142 Libelant's Exhibits B-1, B-2 and B-3.

(Whereupon said documents were marked, respectively, Libelant's Exhibits B-1, B-2 and B-3, and are hereto attached and hereby made a part of these depositions.)

Q. After you received advices concerning the disaster met with respecting this shipment of cattle did you notify the three respective underwriters of the loss?

A. Yes, sir.

Q. Then what further action did you take in the matter, Mr. Frisbie?



A. None.

Q. With respect to advising yourself, however, concerning the actual facts relating to the loss of the cattle, what did you do?

A. I read the report of survey.

Q. Your purpose in securing that report of survey was what?

A. To ascertain the cause of the loss.

Q. And have you got that report of survey with you?

A. Yes, sir.

Q. Will you kindly produce it?

A. It is a part of other papers. That is the original, and here is the translation (producing documents).

Q. Then the original is in Spanish?

A. Yes, sir.

Q. And attached thereto you have a—

143 A. A translation.

Q. —a translation of it?

A. Yes.

Mr. Grace:

The report of survey referred to by the witness in its original in Spanish is offered in evidence, together with the translation thereof attached thereto, and the letter under date of December 2, 1917, addressed to Willcox, Peck & Hughes, Chicago, Illinois.

Mr. Leovy:

They are objected to as res inter alios acta.

Mr. Grace:

Q. The letter of December 2, 1917, is addressed to Willcox, Peck & Hughes because of what fact?

A. Just to notify them, that is all; notify them of a possible loss.

Q. They are agents of the Underwriters.

A. They are our agents, yes, sir.

Q. They are insurance brokers.

A. They are the brokers who arranged the insurance for our account,

Mr. Grace:

The three documents referred to, heretofore offered in evidence, are marked for the purposes of identification as Libelant's Exhibits C-1, the translation C-2, and the letter C-3, and the offer is made solely for the purpose of showing the advices received by the witness on the steamers which influenced his further conduct in the matter.

144 . (Whereupon said documents were marked, respectively, Libelant's Exhibits C-1, C-2 and C-3, and are hereto attached and hereby made a part of these depositions.)

Q. As a result of the report so received covered in the exhibits there, Libelant's C-1 and 2, what did you do? Anything further?

A. Nothing, no, sir.

Q. Why?

A. The contract provides—

Q. The contract of insurance you mean?

A. The contracts of insurance provide that the loss or injury to the cattle is a claim under the policy only when occasioned by an accident to the steamer—stranding, sinking, burning, or fire, or collision.

Q. And having read that report of survey, did you feel that you were justified in further urging the recognition of liability on the part of the underwriters?

A. No, sir.

Q. As a matter of fact, then, did you make any further demands upon the underwriters?

A. No, sir.

Q. Has any one of these three insurance companies offered to make payment, or made payment in any sum?

A. No, sir.

145 Q. Insofar as Armour & Company was concerned, had they complied with all their obligations with respect to these insurance policies? For instance, with respect to the payment of premiums, and so on?

A. Absolutely. That wouldn't offset the claim anyway.

Mr. Grace:

That is all, gentlemen.

#### Cross Examination.

By Mr. Leovy:

Q. You had no other insurance on this cargo at all?

A. No, sir.

Q. And you collected absolutely none?

A. No, sir.

Q. And you expect to collect none?

A. No, sir.

Mr. Leovy:

That is all.

Mr. Young:

That is all.

Mr. Grace:

That is all.

146           W. C. KIRK, called as a witness on behalf  
              of the Libellant, having been first duly sworn,  
testified as follows:

Direct Examination.

By Mr. Grace:

Q. Mr. Kirk, what is your profession?

A. Attorney at law.

Q. How long have you been following that profession?

A. Ten years.

Q. Are you identified in any way with the Libellant  
in this case, Armour & Company?

A. Yes, sir, I am a regular attorney for them.

Q. You are one of the members of the Law Department  
of Armour & Company?

A. Yes, sir.

Q. As such, and in your capacity as attorney and a  
member of the Law Department of Armour & Company,  
did you take any part in any negotiations or dealings had  
by and between Armour & Company and the Central-American  
Cattle Company?

A. I did.

Q. Will you please state when it was that you were  
called in, and why, and what was done? In other words,  
go right ahead and make a statement of all the facts  
within your knowledge relating to this case.

A. After the loading of the cattle on board the  
Steamer Fort Morgan at Port Limon, on or  
147       about November 29, 1917, the Central-American  
Cattle Company made demand on Armour &  
Company for the payment of 420 head of cattle at the  
rate of five cents per pound and \$25.00 per head freight.

Armour & Company withheld payment of this amount  
until they could get more details as to the disaster which  
befell the Fort Morgan.

I was in consultation with Mr. Munnecke, the head of Armour & Company's Cattle Buying Department, and was of the opinion at first that the Central-American Cattle Company might not be able to collect this amount from us because of the fact that under the agreement they were to charter and equip a suitable vessel.

They were persistent on our paying this amount of money immediately, and stated that if the amount was not paid the cattle business would be at a standstill as they were unable to go ahead and deliver more cattle. They also claimed that we were obligated to pay for the cattle immediately upon their being loaded on board the steamer and accepted by our representative at Port Limon.

They, within a short time after making this demand, brought suit against us at New Orleans, and while the matter was in controversy for some little time it was finally agreed by virtue of negotiations between Mr.

Munnecke, Mr. Whilden and myself, that we  
148 would—

Mr. Leovy:

Well, I do not mean to break in too much, but that agreement has been filed, I think. That was the agreement that was reached and a copy of it has been filed here.

The Witness:

Yes.

Mr. Leovy:

Q. You produced it?

A. Yes.

Mr. Leovy:

I shouldn't think it would be necessary to go into that at length.

The Witness:

Well, negotiations resulted in an agreement dated, whatever date that was—

Mr. Leovy:

January 15, 1918.

The Witness:

January 15, 1918, whereby they were paid, or were to be paid, \$19,000.00, and they were to take care of the remaining cattle down there and share in the profits and expenses of taking care of the cattle. In other words, they were to handle the cattle to the best advantage possible, and any cattle that were able to be shipped to Armour & Company later on were to be paid \$25.00 per head freight, and Armour & Company was to pay five cents per pound for fifty per cent of the cattle so delivered.

The cars of the cattle continued for several months and in fact only fifty of the cattle were ever in condition to be shipped to Jacksonville.

149        The expenses of taking care of the cattle, according to statements that were rendered us by the Central-American Cattle Company, of which Armour & Company paid the Central-American Cattle Company one-half, are as follows:

Statement dated December 31, 1918,—this should be December 31, 1917,—amounting to \$405.43 in United States gold; a statement, dated January 11, 1918, amounting to \$641.91; statement dated October 2, 1918, total expenses amounting to \$1,036.48.

Mr. Leovy:

Q. That is a summary, is it?

A. Those are the totals of the expenses.

Q. And they amounted to how much?

A. \$1,036.48. The total of these expenses amounting to \$2,083.82, of which Armour & Company paid \$1,041.91.

Mr. Grace:

Q. Paying one-half thereof.

A. Being one-half thereof. The statement of October 2, 1918, shows a credit to Armour & Company of \$1,490.00, which is one-half of \$2,980.00, the amount received for 149 head of cattle sold at \$20.00 per head.

Q. The payment of \$19,000.00 was intended to cover what?

Mr. Leovy:

That is objected to on the ground that the agreement speaks for itself, and is the best evidence.

A. The payment of \$19,000.00 was to cover the value of the cattle which were lost on board the Fort Morgan and the freight thereon, and a further amount  
150 which was agreed upon. In fact it represents the best settlement that could be made with the Central-American Cattle Company at that time. There was also taken into consideration in making this agreement the fact that we would have to pay them a larger amount of freight on subsequent boats that they would get and put into service.

Mr. Grace:

Q. Then the first position that Armour & Company took, that they ought not to be held as owners of the cattle, was receded from by Armour & Company and they accepted the responsibility of owners of this cattle?

A. Yes, sir.

Q. And it is for and on account of that ownership they are standing as Libelant in this case?

A. Yes, sir.

Q. Now, these various items set out in those exhibits that you have been testifying from, are they covered by vouchers sent up by the Central-American Cattle Company?

A. They are covered by checks that issued by Armour & Company in payment of those bills.

Q. No. I mean, in other words, are the items stated in lump sums there explained in detail by the American Cattle Company, beyond the statements made in these exhibits?

A. Some of them are; some of them are not.

Q. Now, these exhibits that you have testified to amount in number to how many?

A. Six.

Mr. Grace:

These six exhibits testified to from by the witness, referring to the date of each one, are offered in evidence by Libelant, and for purposes of identification herein are marked, respectively, Libelant's Exhibits D-1, D-2, D-3, D-4, D-5 and D-6.

(Whereupon said documents were marked, respectively, Libelant's Exhibits D-1, D-2, D-3, D-4, D-5 and D-6, and are hereto attached and hereby made a part of these depositions.)

Q. Of your own personal knowledge by reason of your access to the records of Armour & Company, do you know that those payments represented as having been made to the Central-American Cattle Company have actually been made by Armour & Company?



A. I have personally seen the vouchers in the Treasurer's Department on all of them, I think.

Q. And you know that these payments have been made.

A. I know that these payments have been made.

Mr. Grace:

That is all.

152

Cross Examination.

By Mr. Leovy:

Q. Mr. Kirk, of course you know nothing about these supposed expenditures by other concerns, such as the United Fruit Company and the Central-American Cattle Company? Those were simply statements that were made to Armour & Company.

A. Yes, sir; that is right.

Q. Now, I do not know that I gathered the figures exactly right, because I seem to have a somewhat different result now than I had when I was figuring while the first witness was testifying.

You have here \$19,000.00 debit, and then you have a payment of \$1,041.91, making \$20,041.91. Now, from that is to be deducted \$1,490.00 that was received, leaving \$18,551.91. Now, it seems to me there was another credit. I do not want to have to go over the story again, but I got before \$17,051.00. Wasn't there another credit?

A. The credit given for fifty cattle that were shipped to Jacksonville.

Q. How much was that?

A. Mr. Munnecke testified that those cattle had a value of \$75.00 per head at Jacksonville. That would make a credit of \$3,750.00. A further debit would—

Q. Well, suppose we put against that credit all deductions in connection with the \$3,750.00. From  
153 that is to be deducted what? The freight?

A. A further debit for freight on the fifty cattle at \$25.00 per head.

Q. That would be—

Mr. Grace:

\$1,250.00.

A. \$1,250.00.

Mr. Leovy:

Q. That would leave a credit of \$2500.00. Now, I want to be fair with you. I want to know whether those fifty cattle—were those divided or did you pay back anything to the Central-American Cattle Company, Incorporated?

A. We paid five cents per pound for 25 of them.

Q. Yes. Well, have you deducted that?

A. Well, we have taken that as—

Q. That has already been taken into consideration?

A. That is taken into consideration.

Q. Yes. That would leave \$16,051.91 as a net debit. If I am correct.

A. No.

Q. Of course, those figures could be checked afterwards.

A. No. The 25 cattle at five cents per pound would approximate \$1,000.00.

Mr. Grace:

\$1,000.00.

The Witness:

That is to be taken as a further payment.

154 Mr. Leovy:

Q. That is to be added, is it?

A. That is to be added.

Q. How much?

A. \$1,000.00. That is a further payment to the Central-American Cattle Company.

Q. That leaves then \$17,051.91?

A. \$17,051.91, money that Armour & Company has actually paid out on account of the cattle which were originally loaded on the Steamer Fort Morgan, after allowing the credits for the fifty that they received.

Q. And, as I understand those various exhibits that you filed in evidence, they simply show that whatever checks were necessary in that settlement of that kind and under that agreement passed between the parties? That is the substance of those? In other words, I do not know what checks passed in settlement, whether it was by an exchange of checks or checks in settlement of balances; but the matter was adjusted on that basis, as I stated?

A. Yes. In every instance a check was sent to the Central-American Cattle Company, except in the case of Exhibit D-6 where a credit was rendered to Armour & Company by the Central-American Cattle Company, representing one-half of the 149 head that were sold in Central-America.

Q. Yes. I understand. As I say, that is a matter of indifference, what particular checks were used in the adjustment, just so that this is the amount, \$17.

155 051.00, which you claim to have been out according to your books in this matter.

A. That is the actual expenditure by Armour & Company on account of these 420 head of cattle, not counting any expense of our men in Central America or any other expenses at all, other than what we have actually paid the Central-American Cattle Company.

Q. Of course, what you have said to Mr. Grace with regard to Armour & Company resuming ownership, and so forth, that is merely a matter of construction of the contract? I mean to say you didn't intend to state any additional fact when you said that, did you?

A. I simply state the position that Armour & Company took at the beginning, and then later on the position they took as an explanation for the reason why they didn't pay the amount right at the beginning.

Q. I mean to say, though, with regard to the position they took later on, the contract shows that?

A. Yes.

Q. The final position they took?

A. Yes, that is right.

Mr. Leovy:

That is all.

Mr. Young:

That is all.

156 Mr. Grace:

There is offered in evidence on behalf of the Libellant the certificate of the Secretary of State with respect to the incorporation of the Libellant, Armour & Company, and it is marked for purpose of identification "Libellant's Exhibit E."

(Whereupon said document was marked Libellant's Exhibit E, and is hereto attached and hereby made a part of these depositions.)

157 State of Illinois,  
County of Cook.

I, Frederick Julian, a Notary Public in and for said County and State, do hereby certify that heretofore, to-

wit, on the 20h day of February, A. D. 1919, personally appeared before me, at the offices of Armour & Company, Union Stock Yards, in the City of Chicago, County of Cook and State of Illinois, Victor H. Munnecke, Ed. J. Mitchell, A. G. Frisbie and W. C. Kirk, witnesses produced on behalf of the Libelant in a certain cause now pending and undetermined in the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, wherein Armour & Company is Libelant and the Steamship Fort Morgan is defendant.

I further certify that the said witnesses were by me first duly sworn to testify the truth, the whole truth and nothing but the truth in the cause aforesaid; that the testimony then given by them was by me reduced to writing, in the presence of the said witnesses, by means of shorthand, and afterwards transcribed upon a typewriter, and the foregoing is a true and correct transcript of the testimony so given by them as aforesaid.

I further certify that I am not counsel for nor in any way related to any of the parties to this  
 158 suit, nor am I in any way interested in the outcome thereof.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal, this 13th day of March A. D. 1919.

(Seal) (Signed)

FREDERICK JULIAN,  
 Notary Public.

Stenographic and Notarial Fees for original and four carbon copies as per stipulation \$113.90.

## 159 DEFENDANT'S EXHIBIT "CHICAGO 1."

Filed February 1, 1922.

New Orleans, Louisiana, January 15th, 1918.

Proposed agreement to settle differences existing between The Central American Cattle Company, Incorporated, of New Orleans, Louisiana, hereinafter referred to as Cattle Company and Armour & Company of Chicago, Illinois, hereinafter referred to as A. & Company, relating to a certain Central American Cattle deal covered by a contract of October 3rd, 1917, and signed by parties above named.

Cattle Company agrees to charter, equip, and operate the Norwegian Steamer "Ellis," its equivalent, or better, at the earliest possible date, equipping same so she will be acceptable to Lloyd's Agency for all cattle risk insurance, inspection for insurance at New Orleans, Louisiana, inspection of fittings at New Orleans, Louisiana, or Port Limon, Costa Rica. The other conditions same as in above mentioned contract of October 3rd, 1917, except that the freight rate on any cattle shipped on Steamer "Ellis" its equivalent, or better, shall be at the rate of Thirty (\$30.00) Dollars per head, United States Currency, from Port Limon or other Central American port or ports to Jacksonville, Florida, it being understood that by paying Thirty (\$30.00) Dollars per head A. & Company does not obligate itself in any way or sense to pay the same rate on Steamer "Belvernon," its equivalent, or vessels of a similar type that may be used in this service and as established in the original contract which is Twenty-Five (\$25.00) Dollars per head A. & Company agrees to advance one-half charter hire per month, month by month, or Twelve Thousand & Five Hundred (\$12,500.00) Dollars in United States Gold, first payment to

be made when said Steamer "Ellis" or its equivalent, or better shall have been surveyed and approved for cattle carrying purposes by Lloyd's Agency at New Orleans and is ready to leave New Orleans for the purpose of handling cattle under this contract. This sum represents an advance on freight to be paid by A. & Company and is to be deducted from the freight earned by said steamer trip by trip. The freight becomes due, and is  
 160 earned, when steamer leaves Port Limon or other Central American Port with a cargo of Cattle for Jacksonville, Florida, or other United States port, and becomes payable at the same time when settlement is made for each cargo of cattle the Cattle Company will give A. & Company a receipt for each Twelve Thousand & Five Hundred (\$12,500.00) Dollars advanced on account of freight earnings said advances to apply against prepaid freights. It is understood that A. & Company takes title to all cattle delivered Free on Board (F. O. B.) Steamer at port of embarkation and that payment for all cattle and freight thereon is to be paid by A. & Company by draft to the order of Cattle Company delivered to Cattle Company's office, New Orleans, Louisiana, immediately upon receipt of cable advice by A. & Company from their representative at port of loading specifying number of head of cattle which have been accepted and loaded on steamer and the weight of same. Said arrangement both in regard to the freight per head and the advancing of charter hire to continue so long as said Steamer "Ellis", its equivalent, or better, shall be used in this service.

Boats Bill of Lading to issued to A. & Company as shipper in every instance. It is understood, however, that all cattle are to be unloaded from the steamers at the port of destination by the Cattle Company at the risk of A. & Company. It is further understood and mutu-

ally agreed, that the Cattle Company is to be in no manner liable for any accident that may happen to any cattle on board of steamer transporting same by reasons of the perils of the sea, sickness, diseases, or any other unavoidable cause whatsoever, they merely agreeing to furnish deck and hold room, water, and attendants for cattle transported. The full freight for all cattle shipped considered as earned when any steamer of the Cattle Company leaves Port Limon, Costa Rica, or other ports of embarkation, no portion of which is to be returned in case of the death, disease, or other disability of said cattle but is to be retained by said Cattle Company considered as earned regardless whether ship lost or not lost, stranded or not stranded. The Cattle Company agrees to provide at their expense the necessary food for the said cattle during the voyage, and proper persons to attend said cattle under the direction of A. & Company's super-cargo.

Cattle Company agrees to put Steamer "Belvernon", its equivalent or better, in this same service as soon after the Steamer "Ellis" shall have been put in said service as is practicable which at this time it is estimated will be about February 15th, 1918, equipped subject to Lloyd's acceptance for all cattle risk insurance, inspection of Steamer at New Orleans, and of fittings at New Orleans or Port Limon Costa Rica and approved as to loading by Lloyd's Representative Port Limon C. R. Freights and attendance and other conditions as amended herein same as specified in contract of October 3rd, 1917.

It is understood that this agreement is entered into by both parties with the view of reaching an amicable settlement of a certain controversy that has existed since the occurrence of the disaster to the Steamship "Fort Morgan" leaving Port Limon, Costa Rica, with a cargo of live cattle consigned to A. & Company, Jacksonville,



Florida, on or about November 29th, 1917. It is, therefore implied and understood that the Cattle Company on their part and A. & Company in a similar respect shall show a disposition to carry out the intent and purpose of the original contract and do everything humanly possible to continue the cattle business as provided for in the original contract of October 3rd, 1917, and as amended herein. That is, the Cattle Company agrees to make deliveries of cattle to A. & Company at Port Limon, or other Central American Ports and A. & Company agrees to accept such shipments as provided for in the original agreement, and as amended herein. It being further understood that such shipments will be made from Port Limon, Costa Rica or other Central American Ports to Jacksonville, Florida, or such other United States Ports as may be agreed upon between these principals. Further, that the spirit of this agreement is to continue this arrangement, and every effort made to dispatch at least four cargoes of live cattle without change in the F. O. B. price of cattle for said four cargoes.

162 It is mutually understood and agreed that this contract being in the nature of an experiment in shipping Central American Cattle to the United States, that if after the shipment of four cargoes of live cattle by the Cattle Company, it is determined by either the Cattle Company or A. & Company that the arrangement is unprofitable, or impracticable, either reserve the privilege of cancelling this contract unless a re-adjustment of prices, which are mutually satisfactory, can be made. In this event, however, it is agreed that neither the Cattle Company or A. & Company shall enter into any similar contract with any other person or persons, firm or corporation, without giving the other party an opportunity of contracting for the purchase and sale of

said cattle on the same terms, that is each party shall give the other the first refusal of any similar contract which it may contemplate making with any other person, or persons, firm or corporation.

As provided for in original contract of October 3rd, 1917, the Cattle Company is in a position to obtain approximately twenty-five thousand (25,000) cattle in the Central American Countries of Guatemala, Honduras, Nicaragua, Costa Rica and Mexico, and transport them by steamer to the United States, in consequence of which the terms of this contract shall be from this date until the the twenty-five thousand (25,000) cattle shall have been purchased by the Cattle Company and delivered to A. & Company, F. O. B. steamer, or steamers, any Central American port, provided, however, that this quantity can be delivered to A. & Company not exceeding a total time of one year from date. If after the Cattle Company has delivered the A. & Company at least four cargoes of live cattle it is decided by either party that the business is unprofitable, or impracticable, at the present agreed price of cattle and freight, either party may call for a re-adjustment of rates, at which time the subject shall come up for discussion and A. & Company shall have the privilege of saying whether they want cattle at the higher cost. It is understood that A. & Company will not be asked to receive more than one steamer load of cattle in any series of seven (7) days.

In settlement of alleged claim, including value  
 163 of cattle and freight thereon by reason of dispute of the ownership of the cargo of cattle loaded on Steamer "Fort Morgan" on November 29th, 1917, which was the cause of the controversy, and with regard to the ownership of some two hundred (200) head, more or less, of cattle that were unloaded alive from said Steamer "Fort Morgan" when she returned to

Port Limon, Costa Rica, said cattle now in pasture some sixty miles from Port Limon, Costa Rica, in charge of Lloyd's Agent, the following terms are proposed:

A. & Company agree to pay Cattle Company the lump sum of Nineteen Thousand (\$19,00.00) Dollars, United States Currency, in full settlement of said alleged claim. One-half of this amount, or Nine Thousand & Five Hundred (\$9,500.00) Dollars is to be paid when Steamer "Ellis," or its equivalent, or better, shall leave New Orleans, Louisiana, for Port Limon, Costa Rica, for the purpose of carrying cattle under the terms of original contract, as amended herewith. Remaining one-half, or Nine Thousand & Five Hundred (\$9,500.00) Dollars to be paid when said steamer, its equivalent, or better, is surveyed and approved as to fittings and loading by Lloyd's Representative at Port Limon, Costa Rica, and actually leaves—the Port of Limon with a cargo of live cattle consigned to A. & Company, Jacksonville, Florida, on her initial voyage. Under this agreement the ownership of the two hundred (200) head of cattle, more or less, now in pasture about sixty miles from Port Limon unloaded from the Steamer "Fort Morgan" on November 29th and 30th, 1917, and in charge of Lloyd's Agent at Port Limon, Costa Rica, becomes the joint property of Cattle Company and A. & Company in equal proportions, and shall be cared for and moved in due time under the direction of the respective agents of these principals. The said two hundred (200) head of cattle, more or less, are not to be tendered for delivery to A. & Company until such a date as they have had time to completely recuperate and recover from bruises or other injuries, which it is presumed they suffered by reason of abuse due to Steamer "Fort Morgan's" disaster. This shall be left to the discretion of the representative of A. & Company who will be instructed to receive and

ship part or all of the two hundred (200) head as he considers any part or all of them sound.

164 All expenses incurred in caring for these two hundred (200) head of cattle, more or less, including all handling charges, miscellaneous expenses, etc., shall be divided between the Cattle Company and A. & Company, with the exception that it is thoroughly understood that when any part portion or all of these cattle are ultimately tendered to A. & Company by the Cattle Company they will be delivered governed by the same terms and conditions as other cattle in this contract and that of October 3rd last. That is, A. & Company will be charged at the rate of five cents (5c) per pound live weight for any part or portion of these cattle delivered F. O. B. Steamer at Port Limon, Costa Rica, and A. & Company will receive from the Cattle Company credit for their Fifty (50%) per cent interest in said cattle. All expenses in handling these cattle up to the time of delivery F. O. B. Steamer at Limon is understood to be for Joint Account, divided equally. It is further understood that A. & Company will pay ocean freight rate on any part or all of these cattle at the same rate paid on other cattle, in other words the Cattle Company does not assume any part of the expenses of ocean transportation. Cattle Company agrees to handle the two hundred (200) head of cattle, more or less, with the same care as other cattle that they may tender for shipment under this contract. As provided in contract of October 3rd, 1917, demurrage on Steamer "Fort Morgan," was to be at the rate of Six Hundred (\$600.00) Dollars per day if due to default of A. & Company at Jacksonville, Florida. It is agreed in this agreement that demurrage is fixed for the Steamship "Ellis" its equivalent, or better, at the rate of Eight Hundred & Fifty (\$850.00) Dollars per day if detained at discharg-

ing port by default of A. & Company. Demurrage is fixed at the rate of Six Hundred (\$600.00) Dollars per day for vessels of type of the Steamship "Belvernon," or its equivalent. It is agreed that A. & Company will furnish free wharfage at Jacksonville where vessel can discharge always safely afloat, but all port charges shall be for account of the Cattle Company. A. & Company agree to receive cattle on dock as fast as vessel can discharge same.

This agreement, entered into between both parties, is predicated upon their desire to settle differences out of Court and is done without prejudice to the interest of either party should it fail of purpose.

(Signed) JOHN H. JONES.

New Orleans, La., Jany. 21/1918.

THE CENTRAL AMERICAN  
CATTLE CO., INC.,

By (Signed) O. R. WHILDEN, President.

New Orleans, La., Jany. 21, 1918.

ARMOUR AND COMPANY,

By (Signed) V. H. MUNNECKE.  
Chgo., Ill., Jan. 18-1918.

(Signed) H. A. PHILLIPS.

Chicago Ill., Jan. 18-1918.

166      EXHIBIT MARKED CENTRAL AMERICA  
"CHICAGO-1."

Filed February 1, 1922.

Republic of Costa Rica,  
City of Port Limon.

E. J. Mitchell, being duly sworn, says, that he is the agent of Armour and Company, a corporation of Chicago, Illinois, U. S. A.; that the said Armour and Company has purchased on board the Steamer Fort Morgan, at Port Limon, Costa Rica, and is to receive at the docks at Jacksonville, Florida, the cattle, 420 in number, on board the Steamer Fort Morgan, sailing from Port Limon, Costa Rica, on the 29th day of November, 1917, that the said 420 head of cattle have not nor have any of them within the sixty days next before the said date of exportation from Port Limon, Costa Rica, passed through any district infected with contagious diseases affecting animals of their kind, except the so-called splenetic or Texas fever (and that the said cattle have been shipped in cars and vessels which were clean and disinfected, except as to splenetic or Texas fever, and that said cattle have not been exposed in any possible manner to the contagion of any contagious disease of animals except the so-called splenetic or Texas fever.

Further deponent saith not.

(Signed) E. J. MITCHELL.

Subscribed in my presence and sworn to before me this 29th day of November, A. D. 1917.

ALBERT B. PULLEN,

(Seal)

American Vice Consul in Charge.

American consular service Fee Stamp, \$2.00.

FRB M.

167 EXHIBIT MARKED "CENTRAL-AMERICAN  
CHICAGO-2."

Filed February 1, 1922.

Exhibit Marked Plaintiff "Two," Annexed to Original  
Petition.

Port Limon, C. R., Nov. 29th, 1917, 5 P. M.

Received, and accepted, from the Central American  
Cattle Co., Inc., in good condition, properly loaded on  
board the Norwegian S/S Fort Morgan, four hundred  
and twenty (420) head of Live Steers, weighing three  
hundred and forty-six thousand, three hundred and two  
pounds, (346,302) live weight, applying on contract be-  
tween the above Company and Armour & Company.

ARMOUR & COMPANY,

By (Signed) EDWARD JAMES MITCHELL.

(Signed) F. A. HOCHERL,

(Signed) B. CLUNIE.

168 Note: Exhibit marked "Defendant's Chicago  
3," same as exhibit marked "Respondent B" at-  
tached to the Answer of the Fort Morgan Steamship  
Company, Limited.

169 Note:

Libelant's Exhibit B-1, being Policy issued by the St.  
Paul Fire & Marine Insurance Company.

Libelant's Exhibit B-2, being Policy issued by the  
Fireman's Fund Insurance Company.

Libelant's Exhibit B-3, being Policy of insurance issued by the Automobile Insurance Company of Hartford, Conn.

Libelant's Exhibit C-1, being a document written in Spanish.

The above documents were transmitted in the original to the U. S. Circuit Court of Appeals as per stipulation of counsel.

170 LIBELANT'S EXHIBIT "C-2."

Filed February 1, 1922.

Translation.

John E. Romagosa Sanchez, Port Captain of Limon, hereby certifies; that in the book of records in his office and on folios 13 and successive, the following proceedings have been recorded; viz: Captainship of Port Limon at 7 A. M. of the 30th day of November of the year one thousand nine hundred and seventeen, last night about 8 P. M. I heard distress signal blowings from Norwegian Steamship Fort Morgan which had sailed yesterday evening about 6 P. M. with a load of cattle destined to Jacksonville, Florida. Immediately I proceeded to go aboard accompanied by Captain Sorensen, United Fruit Company's pilot and Mr. Pullen, United States Vice Consul. On arriving alongside of said ship we noticed she was nearly capsizing, list (about 35 degrees inclination) and the Master informed me that by causes he was not aware of his ship, while steaming out to sea had gradually gone listing to such an extent that the crew



positively refused to continue the voyage. I came back to port with the ship's master and super-cargo and after a brief counsel I decided to send Captain Heckman, Wharf Master, and Sorensen Port's pilot on board again and asked them to suggest what should be done to straighten up the ship and save her from a disaster. On coming back ashore, said Captains told me that the only advisable measure was to put the ship alongside of the wharf and proceed immediately to unload the cattle, most of which should be dead or in bad condition. I ordered the Northern Railway Company to get said ship alongside of the wharf and unload her cargo, for account of whom it may be concerned, and I wired Messrs. Lyon Bros., Lloyd's agent at San Jose, to appear in person in this business or to appoint somebody as receiver for the load of cattle. The telegram referred to reads as follows: "Messrs. Lyon Bros., San Jose. Yesterday evening Norwegian Steamship Fort Morgan weighed anchor bound for Jacksonville, Florida, at 8 P. M., she returned to port blowing distress signals while far yet from land. I immediately went aboard and found she was almost capsizing very heavily listed. The captain told me that the crew refused to continue the voyage under those conditions. I took the ship's master ashore with me and after a brief counsel I decided to send Captain's Heckman and Sorensen on board to inspect said ship and suggest what might be done to save her. On coming back ashore they told me that the ship should be taken alongside the wharf and unload the cattle. I gave orders to do so as the ship was listing more, and about 2 A. M. they commenced to unload the cattle, many of which were dead or badly bruised. All this has been done for account whom may be concerned. As you are Lloyd's agent I give you this prompt notification that you may appear personally in this business or may

appoint a receiver of the cattle and instruct him of what to do. The port's captain John E. Romagosa S.—“Messrs. Captains Heckman and Sorensen to whom I gave verbal instructions in order to act without delay and whose report I received in the same manner signed with me this act of proceedings to legalize what concerns them in same and in presence of the secretary, ad-hoc, who certifies—John E. Romagosa S.—Frederick Heckman.—Yngve Sorensen.—E. Guevara S. Secretary, ad-hoc. “Captainship of port Limon at 7 A. M. on this 30th day of November of the year one thousand nine hundred and seventeen. This Command Resolve. That a deposition be taken at this office from Captain Thomas Johannesen and crew of the Norwegian Steamship Fort Morgan and fixes 2 P. M. today for said captain to appear at this office. In testimony of which I sign in presence of secretary, ad-hoc, who attests:—John E. Romagosa S.—E. Guevara S.—Secretary, ad-hoc,—“Captainship of Port Limon at 11 P. M. of this 29th day of November of the year one thousand nine hundred and seventeen. In view

of the report of Messrs Captains Heckman and  
 171 Sorensen this Command Resolves: That the  
 Norwegian steamship Fort Morgan be put along-  
 side the wharf without delay, and the cattle unloaded  
 for account of whom it may concern, in order to save her  
 from a wreck, and to this end, the following order is sent  
 to the Northern Railway Company: “Northern Railway  
 Co., City. The Norwegian Steamer Fort Morgan being  
 imperiled and after hearing the opinion of Captains  
 Heckman and Sorensen who were commissioned by me  
 to inspect said ship, please have same put alongside of  
 the wharf and unload her of the cattle all for account of  
 whom it may concern. Yours very truly, The Port Cap-  
 tain, John E. Romagosa S.—In testimony of which I  
 sign in presence of the secretary ad-hoc.—who certifies.

John E. Romagosa S.—Guevara S.—Secretary ad-hoc.  
 "at the office of the Port Captain of Limon at 1/P. M.  
 of this 30th day of November of the year one thousand  
 nine hundred and seventeen, personally appeared before  
 me Mr. Thomas Johannessen, of age, single Norwegian,  
 Master Mariner, who being questioned in legal form by  
 this Command to say what happened to his boat, the  
 Steamship Fort Morgan, answered in English, what  
 translated to the Spanish language by the undersigned  
 Port Captain literally says; "I left this port yesterday  
 evening about 6 P. M. bound for Jacksonville, Florida,  
 with a cargo of 420 head of cattle, as you are aware by  
 the ship's clearance papers. When I left this port the  
 steamer was in seaworthy condition notwithstanding she  
 had a 7 degree list to port, as I did figure and prove;  
 but it must be understood that ship always shows that  
 defect even with a heavy load such as bannanas; etc.  
 After passing Uvita Island and on changing the course  
 a heavy wave overtook the ship on her side and listed  
 her so much that very likely the ropes that the cattle  
 were tied with broke and the cattle was thrown to port  
 side, increasing therefore the first incline. As I noticed  
 that there was some discontent among the crew, I called  
 the Super-cargo, who is acting on behalf of the party  
 interested in the load of cattle, and asked him for his  
 opinion in the matter. He answered that he, as well  
 as the other men of the crew, refused to continue the  
 voyage in such existing conditions and, therefore, I de-  
 termined to put back to port and report to you as I did.  
 I must say furthermore that this is not the first time I  
 have taken a load of cattle on this ship; about 8 months  
 ago I took 546 head from Puerto Cortez, Honduras, to  
 Havana, Cuba, without any trouble, therefore, I do protest  
 once, twice and as many times as necessary that what has  
 now happened is not due to malice or neglectfulness of

mine or the crew; but to a mere accident, I must say also that to my judgment the cattle were properly stowed and tied to make the voyage without any danger. After reading to him his deposition he ratifies same and signs it in my presence and that of the secretary ad-hoc, who attests, John E. Romagosa S.—Thomas Johannsen, Master.—E. Guevara S. Secretary, ad-hoc. "At the office of the Port Captain of Limon at 10:30 A. M. on this first day of December, of the year one thousand nine hundred and seventeen. Personally appeared at this office Messrs. Randolph Segenborn, of age, single, finish, sailor Second Mate of the Steamship Fort Morgan; Randolph Lund of age, married, Norwegian, Master Mechanic, Second Engineer of said ship; and John Johnson, of age, single, fireman, Swedish, employed in above named ship, being asked in due form by this command to say what they knew, answered, as spokesman the first one named of the three present and said as follows: "We left this port on the 29th day of last month about 6 P. M. bound for Jacksonville, Florida, with a cargo of 420 head of cattle. We had made about fifteen miles from port when a heavy wave sided the ship, listing her so much to port

172      that very likely the ropes that tied the cattle got broke and said cattle passed to port side, listing the ship at about 35 degrees. All the men of the ship's crew asked the Master to put back to port because it was not possible to continue the voyage in such condition. Captain granted and we turned back. Being asked to say if it is true that when the steamer sailed out from port she was listed to port, answer; it is true the ship had a list to that side and is a permanent defect of said ship, but she was in seaworthy condition, and the cattle properly stowed for the trip, and if it had not been for the accident that happened we would have made the voyage without any trouble. Mr. Lund says:

"It is a fact that the ship has always a list to port and I do not consider her fit for transportation of cattle. Him and Mr. Johnson confirmed what has been deposed by the spokesman. Being asked to say if it is true that some months ago the ship took a load from Puerto Cortez, Honduras, to Havanna, Cuba, they said it was true but they made said voyage with a fine sea. After reading to them their deposition they ratified same and signed in my presence and that of Secretary, ad-hoc, who attests—John E. Romagosa S.—Randolph Segeborn.—Randolph Lund.—John Johnson.—E. Guevara S. Secretary ad-hoc. "At the office of the port captain of Limon at P. M. on this first day of December in the year one thousand nine hundred and seventeen. Personally appeared at this office Messrs. Ernest Mason, single, Jamaican; Charles Johnson, married, Jamaican; Andrew Anderson, single, Norwegian; Erling Kuperlund, single, Norwegian; Geo. Jorgensen single, Danish, Hans Gundersen, single, Norwegian; Thorlief Lie, single, Norwegian; Lars Ulsen, single, Norwegian; Alfred Edmann, single, Swedish, Luwig Reier, single, Norwegian; Karsten Anderson, single, Norwegian; Peter Darlsan, single; Norwegian, all of age and of the crew of steamship Fort Morgan. Being asked by this Command in legal form to say what they know about the accident to said ship after leaving this port on the evening of the 29th day of November ultimo. they said: "We sailed on the 29th day of last month about 6 P. M. bound for Jacksonville, Florida, with a cargo of 420 head of cattle. Soon after leaving port and about 15 miles away a heavy sea overtook the steamer on the side and made her list so much to port that the ropes the cattle were tied with broke and said cattle passed to the inclined side; this made the listing heavier to such extent that we considered it perilous to continue the voyage and we told it so to the Master. On hearing our

wishes and in view of the conditions of the ship the Master decided to put back to port. Being asked to say if it is true that when they left this port the ship was already listed, and if to her judgment she was in seaworthy condition, and if the cattle was properly stowed and tied for the voyage, they said: "We believe that the steamer was seaworthy notwithstanding she was slightly listed to port, this listing didn't embrace any peril because said ship always shows that list, and we would have refused to go out to sea if we had judged there was some danger. About the cattle, we believe that they were properly stowed and tied for the trip. They furthermore depose, that the ship is not fit for the transportation of cattle; that she is very unsteady to take a deck load on account of her permanent listing, notwithstanding the water ballast they put on her; that nevertheless they believed they would have made fine voyage with good weather if the above mentioned accidents had not occurred. After reading to them their depositions they ratified same and signed in my presence, and that of the secretary ad hoc, who attest. John E. Romagosa S.—Earnest Mason, Steward; Charles Johnson, Cook; Andrew Anderson, Third Engineer; Erling Kuperland, Sailor; Geo. Jorgensen, Sailor; Hans Gunderson, Sailor; Thorlief Lie, Fireman; Lars Ulsen, Sailor; Aldred Edmann, Fireman;

173      Lawigg Reier, Collier; Karsten Anderson, Collier; Peter Karlsen, Fireman; E. Guevera, S.—secretary ad-hoc; at the office of the port captain of Limon at 5 P. M. of this first day of December of the year one thousand nine hundred and seventeen, Personally appeared at this office Messrs. Adolph Dittmer, single, Englishman, fireman; Carl Norquist, single, Swedish, fireman, Soren Johannsen, married, Norwegian, chief engineer; and Axel Hansen, single, Norwegian, fireman, all of age and men of the crew of the steamship

Fort Morgan; being questioned by me in legal form to say what they know about the accident occurring to said ship on Thursday the twenty-ninth of last month they said: "That they sailed on the 29th ulto. about 6 P. M. with a load of cattle destined to Jacksonville, Florida; that when they left this port, notwithstanding the ship was slightly listed, she was in seaworthy condition. But that about 10 miles outside and on account of heavy seas beating her on the side the cattle very likely got loose and crowded up on the inclined side; therefore, it was impossible to continue the voyage under those conditions; that then they all went to ask the captain to put back to port; that first he refused to do so, but that they insisted and then he granted to return. Being asked to say if it is true the ship left this port listed to port and if they are aware that said ship shows always that defect, answered; "That they do not know that the boat has that list on account of defective construction but rather because the way she was built cannot take a deck load; nevertheless they made a trip on her from Galveston to Guantanamo, Cuba, with a deck load of lumber and being then listed as when she left port and that nothing happened notwithstanding they had bad weather on the trip. Being asked to say if they know on what conditions were the water ballast tanks, they said; That they were in good condition except the one on the port side that was empty. Being questioned to say on what conditions was the cattle when they sailed and if they were properly stowed for the voyage; three of them answered that they did not know and Mr. Dittmer said; that a few head of cattle were loose, that he believed should have been tied but that he doesn't understand anything about stowing cattle and if they left those few loose they thought best to have them so. After having read to them their depositions they ratified same and signed in my

presence and that of the secretary ad hoc who attests. John E. Romagosa S.—Soren Johannsen, Chief Engineer; Adolph Dittmer, Carl Norquist.—Axel Hansen, E. Guevara S.—Secretary ad hoc. “At the office of the port Captain of Limon at 10 A. M. of the 2nd day of December of the year one thousand nine hundred and seventeen. Personally appeared at this office Messrs. Ingwald Christiansen, single, Norwegian, first mate on steamship Fort Morgan; Olaf Forsdall, single, Norwegian, sailor on said ship; Obediah Ford, single, Jamaican servant; Gairest Huxtable, single, Jamaican, and Edward Wilkinson, married, United States citizen and super-cargo on said ship. Being questioned in legal form to say what they know about the accident that happened to the Steamship Fort Morgan on the evening and night of the 29th of last month said as follows: “Mr. Christiansen answered as spokesman: “We left about 6 P. M. bound for Jacksonville, Florida, with a load of 420 head of cattle. Since we left the wharf the steamer had a list to port of about 8 degrees and as we were going out we noticed that she was listing more and when putting off to sea we tried to straighten her up, pumping out the port ballast tanks and passing coal from the port bunker to the starboard bunker; but as when we were out of port the rolling was too heavy it was impossible to continue passing coal from one bunker into another and also on account of the increased listing as the cattle leaned to the inclined side, it was impossible to then continue the voyage. In view of the bad conditions we were under all men of the crew asked the captain to put back to port and so he did. Being questioned to say why if the ship was listing more as they were putting out to sea they did not return to this port immediately: he answered “Because that happens to that ship very frequently and we are used to straightening her up whenever she is



put off to sea with a list to either side by distributing properly the water in the ballast tanks and the coal in the bunkers. Being questioned to say why this time they couldn't straighten the ship he said: "I suppose it was on account of the heavy waves taking her on the side and as the ship was lightly loaded and with a deck cargo the rolling was too much and the cattle leaned all to one side. Being questioned to say if when the ship left this port she was in seaworthy condition said: That she was seaworthy and that altho she was listed while putting out to sea we hoped to straighten her up as usual, but her listing when about 12 miles outside was 35 degrees which practically made working impossible. Being questioned to say at what time they put back to port say; "It was 7:15 P. M. when they put back to port. Mr. Wilkenson being asked to say as super-cargo, what he knows about the conditions the cattle was stowed on board said: "The cattle was properly stowed for the voyage all put up in pens and all tied except a few head; but as I say, all protected and divided up by lumber railings. The cattle was so conveniently stowed that three head only came out from their pens, all the rest were found in their respective stalls without breaking the ropes they were tied with. Being questioned to say how the cattle leaned to the inclined side if they did not come out of their pens and did not break the ropes that tied them, he said that properly speaking the cattle did not lean to the listing side of the ship more than the ropes could allow them and that said ropes were about two feet long. He furthermore deposes from the time they were going out from port they noticed the ship was listing and that he cannot explain why the passing of the coal to the starboard bunker and the pumping out of the port tank didn't give any good results. The other deponents declared in the same terms but Ford said further

he believes the accident was due to the heavy rolling of the ship and Huxtable said that, it is true, that the cattle did not lean more than the rope permitted and that said ropes did not break. Mr. Wilkinsen says furthermore that he is sure that if the ship did not put back to port she would have been a sure loss. After reading them their depositions they ratified and signed same in presence of undersigned port captain and secretary ad hoc who attests. John E. Romagosa S.—Edward Wilkinson; Inwald Christiansen.—Olaf Forsdall: Obdeiah Ford.—Gairest Huxtable.—E. Guevara S.—Secretary ad hoc. "At the office of the port captain of Limon at 9 A. M. of the 3rd day of December of the year one thousand nine hundred and seventeen, personally appeared at this office Messrs. Frederick Heckman, of age, married, English, Master Mariner, and Captain of the Wharves at this port; Yngve Soranson, of age, married, Norwegian, Master Mariner, and pilot of the Steamers of the United Fruit Company, being questioned in legal form by this Command, to said, if they believe that the steamship Fort Morgan was seaworthy condition when she put out to sea, they answered: "That they believe she was seaworthy: Being questioned to say if they knew that the cattle was properly stowed for the trip they said, that they believed the cattle was conveniently and properly arranged for the trip. Being questioned if it is true that when the steamer was leaving this port had a list and what do they think is the cause for what happened to said ship they said: "We believe that the list when the ship was leaving port was no cause to fear anything might occur, because we had seen same ship put out to sea with a load of banannas with a heavier list than the one she had this time, and, when she is on her way, they always straighten her up by passing coal and water to the other side. We believe that on this occasion

on account of the heavy seas she had on her side and the cattle leaning to the inclined side making the listing heavier they did not have time to pass the coal and straighten her up. Furthermore, this ship always shows some listing to either side. When she came in loaded with general merchandise she was listed, and after she was unloaded she always showed the same listing. After reading to them their depositions they ratified and signed in presence of the undersigned captain  
 175 of the port and the Secretary, ad-hoc, who attests—John E. Romagosa S.—Frederick Heckman, Yngve Sorensen: E. Guevara S.—Secretary ad-hoc. at the office of the port captain of Limon at 10 A. M. on the 3rd day of December of the year one thousand nine hundred and seventeen. Considering it convenient to attach to this proceedings the notes between this Command and the port doctor about the best way to bury or destroy the carcasses of the dead cattle on board of the Steamship Port Limon, are as follows: Limon, Nov. 30, 1917. To the Doctor of the Port, City. On account of the disaster happened to Steamship Fort Morgan which was taking on a load of cattle there are a considerable number of dead head, not less than 200, and I would request you to suggest which is the most convenient, economical way to destroy said carcasses with out injuring the health of the port. Awaiting your instructions, I am, yours very truly, John E. Romagosa, S.—And his answer is as follows; Limon, Nov. 30, 1917, Mr. Captain of the Port, City, Referring to your esteemed favor of this date in view of the considerable number of dead cattle caused by the disaster of the Steamship Fort Morgan and in order to make it less expensive to fulfill with the requirements of "Public Hygiene" this Command resolves, that all the dead cattle be taken on the same ship to a distance outside of this port, not less

than 20 miles, where the carcasses will be opened and the Viscera extracted to avoid their floating. All the carcasses must be dumped in the sea with sufficient weight for submersion. I have disposed it so because I consider it less expensive and less inconvenience than burying the dead animals at a far distance from town, which, would, no doubt, cause considerable expense. In order to be sure that these sanitary orders are carried out I request you to let an inspector of Hygiene of the city to go on board the ship. Marine Sanitary Physician ..... P. J. Hugo Delgado. .... In testimony of which I sign in presence of Secretary ad-hoc who attests. John E. Romagosa S.—E. Guevara S.—Secretary ad-hoc.

Upon request of interested party I drew this certificate at the city of Limon on the 4th day of December of the year one thousand nine hundred and seventeen. John E. Romagosa S.—E. Guevara S. Secretary ad-hoc (Seal) —Captainship of port—Limon, Costa Rica.

176

British Consulate.  
Port Limon, Costa Rica.

For the legalization of the signature of Juan E. Romagosa S.—and E. Guevara S.—Captain of the Port of Limon, Costa Rica, and Secretary, ad-hoc, to said Port Captain, respectively. The said Juan E. Romagosa S.—and E. Guevara S., personally appeared before me and affixed their signatures and seal of office to the foregoing office in my presence. I certify that said Juan E. Romagosa and E. Guevara S. are competent and duly constituted Local Authorities, and that the aforementioned document is a valid document in the Republic of Costa Rica.

Give under my hand and seal this fifth day of December, in the year one thousand nine hundred and seventeen.

(Signed)

F. GORDON,  
Acting British Consul,  
5/12/17.

Stamped and sealed, British Consulate, Port Limon.

I hereby certify that F. Gordon is the Acting British Consul at this city and that the signature as above is genuine.

Given under my hand and seal of office this 5th day of December, 1917.

(Signed)

STEWART E. McMILLIN,  
American Consul.

Stamped American Consular Service \$2.00 Fee stamp.

177

LIBELANT'S EXHIBIT C-3.

Filed February 1, 1922.

Willcox, Peck & Hughes,  
Chicago, Illinois.

December 2nd, 1917.

Gentlemen:

We refer to our letters of December 1st, enclosing application for \$29,400.00 on 420 head of live cattle, Port Limon to Jacksonville, per the S. S. "Port Morgan" which sailed on the 29th ult. and beg to advise that we have cable advice that this boat listed after leaving port and returned to Port Limon and we have cabled for particulars. If survey report shows that loss is claim under our open contract we will file claim with you for

collection from Underwriters, otherwise not. Please advise Underwriters accordingly and oblige,

Yours very truly,

LGF:L

ARMOUR and COMPANY.

178 LIBELANT'S EXHIBIT "D-1".

Filed February 1, 1922.

The Central American Cattle Company, Inc.

New Orleans, La., February 13th, 1918.

Armour & Company,

To—The Central American Cattle Co., Inc.

1918.

Feb. 12—To value of 507 steers weighing 447,677 lbs. loaded in good order F. O. B. the S/S "Ellis" at Fort Limon, Costa Rica—447,677 Lbs. live weight of steers at .05 per Lb. ....	\$22,383.85
Feb. 12—To value of prepay freight on 507 loaded in good order aboard the S/S Ellis at Port Limon, Costa Rica, at \$30.00 per head .....	15,210.00
Feb. 12—To balance of our cattle claim ex S/S "Fort Morgan" .....	9,500.00
Feb. 12—By advance of Armour & Company on Charter hire of the S/S "Ellis", and applicable as credit item on value of prepaid freight of above cattle	\$12,500.00

Feb. 12—To balance due The Central American Cattle Company Inc., which is in accordance with our original contract of October 3rd, 1917, and as amended under date of January 15th, 1918 .....	34,593.85
	<hr/>
	\$47,093.85    \$47,093.85

179

## LIBELANT'S EXHIBIT "D-2."

Filed February 1st, 1922.

The Central American Cattle Company, Inc.

New Orleans, La., January 30th, 1918.

We acknowledge to have received this day from Armour & Company, through Armour & Company Limited of New Orleans, Louisiana, the sum of Nine Thousand Five Hundred Dollars (\$9,500.00) Cash, being one-half of Nineteen Thousand Dollars (\$19,000.00) which Armour & Company agreed to pay us as per agreement of January 15th, 1918, in connection with the loss of cattle, etc., through the failure of the Steamship "Fort Morgan" to make the voyage from Port Limon to Jacksonville, Florida, which voyage began on November 29th, 1917. This payment of Nine Thousand Five Hundred Dollars (\$9,500.00) is predicated upon the sailing of the Steamship "Ellis" from New Orleans, this day, for Port Limon, via Cuba, to enter upon the performance of the contract between Armour & Company and ourselves of date October

3rd, 1917, as modified by contract of date January 15th.  
1918.

(Signed) THE CENTRAL AMERICAN  
CATTLE C. INC.,  
J. G. AYCOCK,  
Secty.-Treas.

180 LIBELANT'S EXHIBIT "D-3."

Filed February 1, 1922.

The Central American Cattle Company, Inc.

New Orleans, La., March 9th, 1918.

Armour & Company,

To—The Central American Cattle Co. Inc., Dr.

For your one-half proportion of expenses  
incurred for our Joint Account on  
Fort Morgan lot of cattle as per at-  
tached detail statements of the United  
Fruit Company, Costa Rica Division.

December 31, 1919—Statement .....	\$405.43
January 11, 1918—Statement .....	\$641.91
	<hr/>
	\$1,047.34
Your one-half proportion .....	\$523.67



## 181 LIBELANT'S EXHIBIT "D-4."

Filed February 1, 1922.

The Central American Cattle Company, Inc.

Limon, December 31, 1917.

Lyon Hermanos (Lloyd's Agent)—Account Steamship  
Fort Morgan.

To The United Fruit Company, Costa Rica Division, Dr.

1917 Colone Account.

Dec. 1	Proportion of Salary J. H. Wilson Nov. 28th to 30th	30.72
	Proportion of Salary R Reo Nov. 28th to 30th .....	13.77
	Railway Freight on Cattle ..	847.05
" "	Handling dead cattle on wharf .....	4.25
" 3	Board for Cowboys .....	13.40
" 10	Pasturage paid Victor Pacheco on 210 Head cattle	94.50
	Amount paid Autorides de Higbiene for certificate re dead cattle .....	25.00
	Amount paid Juan E. Ramagosa for certificate re accident on board Fort Morgan .....	140.00
" 12	Auto service in Limon December 7th and 12th ....	28.75

	Wharf Charges as per bill attached .....	31.15	
	Wharf Charges as per bill attached .....	220.00	
	Building cattle chute .....	5.00	
	Loading cattle, salt, etc. ..	53.00	
	Attending salvage cattle ....	4.00	
" 14	One half Clearances charges Fort Morgan .....	3.00	
" 19	Care of stock, repairing pasture fences, saving hides	345.00	
	Railway transportation M. Ricos .....	7.80	
" 20	Receiving cattle ashore from Fort Morgan .....	62.40	
	Discharging live cattle at pier and dead cattle at sea ....	279.10	
	Proportion of salaries Foreman and timekeeper .....	33.25	
	Bill Viriato Espinach loading cattle .....	61.00	
	Expenses J. H. Wilson Supt. Santa Clara .....	61.00	
	Hides and tallow sold .....		278.00
	Balance .....		2027.14
		<hr/>	
		\$2305.14	\$2305.14
Jan. 1	Balance due .....	2027.14-c	
		405.43-U.S.C.	

## 182 LIBELANT'S EXHIBIT "D-5."

Filed February 1, 1922.

The Central American Cattle Company, Inc.

Limon, C. R., Jan. 11, 1918.

Lyon Hermanos (Lloyd's Agent)—Account Steamship  
Fort Morgan.

To The United Fruit Company, Costa Rica Division, Dr

1917 Amount Due in U. S. Currency

Dec. 1	Use of Steam Crane on wharf	25.00
" "	British Consul Fees Ft. Morgan .....	6.68
" "	Amt. paid American Consul for Authentication of signatures and certifying documents re Ft. Morgan ...	25.00
	Amt. paid Capts. F. Heckman & Y Sorensen for attending survey .....	60.00
" "	Wharf charges per bill ....	18.14
" "	Pilotage bill .....	21.00
" "	Wharf charges per bill ....	80.78
" "	Wharf charges per bill ....	51.50
" "	Prop'n Capt. Heckman's salary supervising discharging, etc. ....	32.00
" "	Prop'n Cap. Y Sorensen's salary supervising discharging, etc. ....	45.00

## 1917

Dec. 2	Arsenic .....	.77	
" "	Special train Limon to Guapiles, Dec. ....	35.00	
" "	Fumigating S. S. Ft. Morgan .....	25.00	
" "	Supt'ce Pay roll Santa Clara Dec. 1917 .....	20.05	
" "	Pasturage on cattle Dec. 70c. per head per month .....	135.71	
	1 Gallon Carboline .....	1.20	
	30 lb. salt .....	.53	

## 1918

Jan. 11	Attendance to cattle .....	11.68	
	60 lb. salt .....	1.06	
	Salvaging 1 hide .....	.40	
	Pasturage to Jan. 11, 1918 ..	49.92	
	Value of 1 hide sold .....		4.18
	Value of 5 lb. tallow sold ..		.33
	Balance due .....		641.91
		<hr/>	
		\$646.42	\$646.42
Jan. 11	Balance .....	\$641.91	

183

## LIBELANT'S EXHIBIT D-6.

Filed February 1, 1922.

The Central American Cattle Company, Inc.  
New Orleans, U. S. A.

October 2nd, 1918.

Final Statement of Expenses and Outturn of Cattle  
Discharged from Steamer Fort Morgan Voy #5. at  
Limon Costa Rica November 29, 1917.

Expenses paid by the Central American Cattle Co., Inc., to the United Fruit Company, Costa Rica Division, for attendance to Cattle, the joint property of Armour & Company and the Central American Cattle Co., Inc., for period from March, 1918, to date of sale of cattle, as per original vouchers attached hereto.

March—	To pay roll charges .....	\$25.25
	To Pasturage, etc. ....	102.03
April—	To Lloyd's Agent for services rendered	125.00
	To Lloyd's Agent for services rendered	100.00
	To Juan E. Romagosa for services rendered .....	100.00
	To Pasturage, etc. ....	112.22
	To Pay Roll charges .....	25.00
May—	To Pasturage, etc. ....	112.87
	To Pay Roll charges .....	26.60
June—	To Miscellaneous expenses weighing cattle .....	28.73
	To Pay Roll charges .....	28.46
	To Pasturage, etc. ....	119.16
July—	To Pasturage, etc. ....	104.28
	To Pay Roll charges .....	22.88
	To American Consul for affidavits ..	4.00

---

Total .....\$1,036.48

Your one-half proportion of above expenses .... \$518.24

Revenue from sale of cattle to the United Fruit Company, Costa Rica Division .....

149 Head Cattle @ 20.00 per head ....\$2,980.00

Your one-half proportion of above revenue ....\$1,490.00

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Balance due Armour & Company .....\$ 971.76

184

## LIBELANT'S EXHIBIT E.

Filed February 1, 1922.

Certificate No. 3333.

State of Illinois,  
Office of The Secretary of State.

Amount fees paid \$. . . . .  
(Paid Mar 15, 1900)  
\$20045)

State of Illinois,

Cook County, ss:

To Hon. James A. Rose, Secretary of State of the State  
of Illinois:

We, the undersigned, J. Ogden Armour, P. Anderson Valentine, and Louis C. Krauthoff, all of the County of Cook, in the State of Illinois, propose to form a corporation under an Act of the General Assembly of the State of Illinois, entitled "An Act Concerning Corporations," approved April 18, 1872, and all acts amendatory thereof; and for the purposes of such organization, we hereby state as follows, to-wit:

1. The name of such corporation is "Armour and Company."

2. The objects for which it is formed are, (a) to carry on a general mercantile and manufacturing business, and, particularly, to buy, sell, and deal in cattle, hogs, sheep, and other livestock; grain, poultry, butter, eggs, and other agricultural and dairy products; manufactured articles produced or resulting, in whole or in

part, from slaughtered live-stock and agricultural products; and cooperage and other receptacles and appliances for holding, keeping, storing, shipping and handling manufactured products; (b) to slaughter live-stock, and to manufacture each and every product of or from such live-stock or agricultural products, and all articles and commodities for use as food, or in commerce, manufacture, the sciences, and the arts; (c) to hold erect, purchase, acquire, manufacture, produce, operate, equip, maintain, and utilize packing houses, factories, mills, stock yards, office buildings, warehouses, branch establishments, sales-rooms, grain elevators, scales, mines, vessels, and other craft, refrigerator and other cars and other rolling stock or vehicles or means of transportation, ice houses, refrigerating and electric light or other

lighting, heating, or power generating plants,  
 185 printing establishments, and any and all other  
 real estate and personal property pertaining to  
 the successful conduct of the businesses aforesaid, and  
 to sell, lease, rent or otherwise dispose of, any and all  
 of the aforesaid properties and appliances and the proceeds, products, use or contents thereof; (d) to engage  
 in any and all undertakings in any way growing out of  
 concerning, or relating to any of the objects or purposes  
 aforesaid, or to the development or extension of the  
 industries and the trade in or use of the products above  
 referred to: (e) to invest any and all its surplus funds  
 and earnings in such property or securities as it may  
 lawfully select and hold, and to borrow such moneys  
 as it may deem necessary for its operations, from time  
 to time; and (f) generally, to purchase, manufacture,  
 sell, and deal in any and all kinds and character of  
 property, real, personal or mixed, authorized or permitted  
 by law.

3. The capital stock shall be Twenty Million Dollars (\$20,000,000).

4. The amount of each share is One Hundred Dollars.

5. The number of shares is Two Hundred Thousand.

6. The location of the principal office is in the City of Chicago, in the County of Cook, State of Illinois.

7. The duration of the corporation shall be Ninety-Nine Years.

Dated at the City of Chicago, in the State of Illinois, this twelfth day of March, A. D. 1900.

J. OGDEN ARMOUR,  
P. ANDERSON VALENTINE,  
LOUIS C. KRAUTHOFF.

186      State of Illinois,  
            County of Cook, ss:

I, William J. Quin, a Notary Public in and for the County of Cook and State aforesaid, do hereby certify that on this twelfth day of March, A. D. 1900, personally appeared before me J. Ogden Armour, P. Anderson Valentine, and Louis C. Krauthoff, to me personally known to be the same persons who executed the foregoing statement, and severally acknowledged that they executed the same for the uses and purposes therein set forth.



In witness whereof, I have hereunto set my hand and seal at the City of Chicago, in the County and State aforesaid, on the day and year above written.

WILLIAM J. QUIN,

(Seal)

Notary Public within and for  
the County of Cook in the  
State of Illinois.

Filed Mar. 15, 1900.

JAMES A. ROSE,

Sec'y of State.

187

State of Illinois,

Department of State.

James A. Rose, Secretary of State.

To all to Whom these Presents shall come—Greeting:

Whereas it being proposed by the persons hereinafter named to form a Corporation under an Act of the General Assembly of the State of Illinois, entitled, "An Act Concerning Corporations," approved April 18, 1872, in force July 1, 1872, and the amendments thereto, the object and purposes of which corporation are set forth in a statement duly signed and acknowledged according to law, and this day filed in the office of the Secretary of State;

Now, therefore, I, James A. Rose, Secretary of State of the State of Illinois, by virtue of the power vested in and the duties imposed upon me by law, do hereby authorize, empower and license J. Ogden Armour, P. Anderson Valentine, and Louis C. Krauthoff, the persons whose names are signed to the before-mentioned statement as Commissioners to open books for subscrip-

tion to the Capital Stock of Armour and Company, such being the name of the proposed corporation, as contained in the statement, at such times and places as the said Commissioners may determine.

In testimony whereof, I hereto set my hand and cause to be affixed the Great Seal of State.

Done at the City of Springfield, this Fifteenth day of March, A. D. 1900, and of the Independence of the United States the one hundred and twenty 4th.

JAMES A. ROSE,  
(Seal) Secretary of State.

188      To James A. Rose,  
            Secretary of State of Illinois:

The Commissioners duly authorized to open Books of Subscription to the capital stock of Armour and Company pursuant to license heretofore issued, bearing date the 15th day of March, A. D. 1900, do hereby report that they opened Books of Subscription to the capital stock of said company, and that the said stock was fully subscribed; that the following is a true copy of such subscription, viz:

We, the undersigned, hereby severally subscribe for the number of shares set opposite our respective names to the capital stock of Armour and Company and we severally agree to pay the said company, for each share, the sum of One Hundred Dollars on demand.

Name.	Shares	Amount.
Philip D. Armour .....	100,000	\$10,000,000.00
J. Ogden Armour .....	50,000	5,000,000.00
J. Ogden Armour, May E. Armour, P. Anderson Valentine, the last will and Testament Executors and Executrix of Philip D. Armour, Jr., deceased .....	50,000	5,000,000.00
Total .....	200,000	\$20,000,000.00

189            That on the twenty sixth day of March, A. D. 1900, at the office of Armour and Company No. 205, Lasalle Street, Chicago, Illinois, at the hour of two o'clock P. M., they convened a meeting of the subscribers aforesaid, pursuant to notice required by law which said notice was deposited in the post office properly addressed to each subscriber, ten days before the time fixed therein a copy of which said notice is as follows, to-wit:

To Philip D. Armour, J. Ogden Armour and J. Ogden Armour, May E. Armour, and C. Anderson Valentine, executors and executrix of the last will and testament of Philip D. Armour, Jr., deceased,

You are hereby notified that the capital stock of Armour and Company has been fully subscribed and that a meeting of the subscribers of such stock will be held at the office of Armour and Company No. 205, La Salle Street, Chicago, Illinois, on the twenty-sixth day of March, A. D. 1900, at two o'clock P. M. for the purpose of electing a Board of Directors for said company,

and for the transaction of such other business as may be deemed necessary.

(Signed) J. OGDEN ARMOUR,  
P. ANDERSON VALENTINE,  
LOUIS C. KRAUTHOFF,  
Commissioners.

190 That said subscribers met at the time and place in said notice specified and proceeded to elect Directors and that the following persons were duly elected for the term of one year, viz:

Philip D. Armour, J. Ogden Armour, P. Anderson Valentine, Calvin M. Favorite, Thomas J. Connors.  
HENRY P. DARLINGTON,  
ARTHUR MEEKER,

J. OGDEN ARMOUR,  
P. ANDEISON VALENTINE,  
LOUIS C. KRAUTHOFF,  
Commissioners.

State of Illinois,  
County of Cook, SS.

On this sixth day of April, A. D. 1900, personally appeared before me, a Notary Public in and for said County in said State, J. Ogden Armour, P. Anderson Valentine and Louis C. Krauthoff, and made oath that the foregoing report by them subscribed is true in substance and in fact.

WILLIAM J. QUIN,  
(Seal) Notary Public, within and for  
Cook County, Illinois.

Filed Apr. 7, 1900. James A. Rose, Sec'y of State.

191

State of Illinois,  
Office of the Secretary of State,

Department of State.

James A. Rose, Secretary of State.

To all to whom these presents shall come, greeting:

Whereas, a statement, duly signed and acknowledged has been filed in the office of the Secretary of State, on the 15th day of March, A. D. 1900 for the organization of the "Armour and Company" under and in accordance with the provisions of "an Act concerning Corporations" approved April 18, 1872 and in force July 1, 1872, and all acts amendatory thereof a copy of which statement is hereto attached:

And whereas, a license having been issued to J. Ogden Armour, P. Anderson Valentine and Louis C. Krauthoff as commissioners to open books for subscription to the capital stock of said company, and whereas the said Commissioners have, on the 7th day of April, A. D. 1900 filed in the office of the Secretary of State a report of their proceedings under said license, a copy of which report is hereto attached.

Now, therefore, James A. Rose, Secretary of State of the state of Illinois by virtue of the powers vested in me by law do hereby certify that the said "Armour and Company" is a legally organized corporation under the laws of this state.

In testimony whereof, I hereto set my hand and cause to be affixed the Great Seal of State.

Done at the City of Springfield this 7th day of April,  
in the year of our Lord one thousand 900 and of the  
Independence of the United States the one hundred and  
24th.

(Seal) JAMES A. ROSE,  
Secretary of State.

Filed Apr. 7, 1900, James A. Rose, Sec'y of State.

192 EXHIBIT—ARMOUR B-1—RADIOGRAM  
FROM MASTER SS FORT MORGAN  
TO ELLIS, DATED DEC. 4TH, 1917.

Filed February 1, 1922.

Radiogram.

Tropical Radio  
Telegraph Company  
Operating in Connection with  
United Fruit Company.

To Dated Port Limon, Costa Rica,  
December 4th, 1917.  
Ellis  
New Orleans

Burge all cattle loaded properly disaster caused by  
ballast tanks and heavy seas probably sail tomorrow  
new orleans Fortmorgan left port in seaworthy condi-  
tion.

(Signed) THOMAS JOHANNESSEN,  
Master Steamship Fortmorgan.  
THOMAS JOHANNESSEN,  
Master S/S Fort Morgan

193

EXHIBIT ARMOUR B-2.

Filed Feb. 1922.

Port Limon, C. R., Dec. 4, 1917.

All cattle properly loaded disaster caused by ballast tanks and heavy seas. Probably sail tomorrow, New Orleans.

(Signed) THO. JOHANNESSEN,  
Master, S/S Fort Morgan.  
Port Limon, C. R., Dec. 4th/17.

Fortmorgan left port in seaworthy condition.

(Signed) THO. JOHANNESSEN,  
Master, S/S Fort Morgan.

Witness:

(Signed) J. H. LOCKHILL.

Witness:

(Signed) E. J. MITCHELL.

Formula No. 3      No de orden 64 No de palabras 16

Tellgrafoc Nacionales.

Costa Rica

Cablegrama.

Advertencias:—El Gobierno non sume ninguna responsabilidad a consecuencia del servicio telegrafico. La rectificacion de un parte se cobra como su original cuando no haya error en la transmission. Los telegramas que se transmitan depues de las diez de la noche pagran 75 centimos de sobre tasa No sera transmitido parte alguno sin ser pagado antes su valor y de ningun modo si contuviere insultos o palabras obscenas o contrarias a las leyes y buenas costumbres.

Depositado en New Orleans el 3 de ID de 19 a las 6.50 P. M.

Recibido en Limon el 3 de Pic de 19 17 a las 10 P. M.

Fort Morgan Port Limon.

Advise if Cattle properly loaded also what caused accident and when will sail.

(Signed)      BURGE.  
El Telegrafista.

(Signed)      SOHS. U.



194    ARMOUR EXHIBIT B-3—RADIOGRAM FROM  
         MASTER SS "FORT MORGAN" TO ELLIS,  
         NEW ORLEANS DATED 12/5/17.

Filed February 1, 1922.

Radiogram.

Tropical Radio  
Telegraph Company  
Operating in Connection with  
United Fruit Company.

Dated Port Limon, Costa Rica.  
December 5th, 1917.

To  
    Ellis  
    New Orleans

Burge Fortmorgan requires drydocking and some repairs last drydocked Neworleans May nineteen seventeen

THOMAS JOHANNESSEN,  
Master Steamship Fortmorgan.

(Signed)    THO. JOHANNESSEN,  
              Master S/S Fort Morgan.

195

Radiogram.

Tropical Radio  
Telegraph Company  
Operating in Connection with  
United Fruit Company.

Bently Code Used.

Dated December 5th, 1917.

To

Munnecke

Armour Company  
Chicago

Uczarriler avmqrikyzo bukynjojob olbafgikob hiyjdilurv  
avlys new orleans wilkison asyup

MITCHELL.

Paid Charge acct. O. R. Whilden.

Translation: Survey report ship ballasted insuffi-  
ciently, cattle being loaded properly, fittings held intact.  
Proceeds in ballast to New Orleans, Wilkison on board.

196

Radiogram.

Tropical Radio  
Telegraph Company  
Operating in Connection with  
United Fruit Company.

Bentley Code Used

To

Dated December 4th, 1917

Munnecke

Armour Company  
Chicago

Uggajlafzy uzaekmid achukbukyn warorscowr cewico-  
font

MITCHELL.

Paid: Charge acct. O. R. Whilden.

Translation: Referring to my telegram of November 30th do you understand that I accepted cattle when steamer cleared port.

197

Radiogram.

Tropical Radio  
Telegraph Company  
Operating in Connection with  
United Fruit Company.

November 30th, 1917.

Bentley Code Used.

To

Munnecke

Armour Company  
Chicago

Fortmorgan cewicoftue lafwolozy bulekjojob olbafvy-  
rfa nowozmimhe lojenogkma onkegjjoceer pyhkehyand  
ossogoboyuv ofwebenigs boyuvuhlfo

MITCHELL

Paid: Charge account O. R. Whilden.

Translation: Fort Morgan cleared this port november 29th 420 head of cattle being loaded properly weighing 346,302 pounds. Put back owing to listing not seaworthy I will not receive cargo, Port Master disposing of cargo. Telegraph what to do.

198           Note: Libelant's Exhibit A-2 being Live  
              Stock Contract, dated November 29th, 1917,  
same as Exhibit "D" annexed to the Supplemental  
Libel.

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199           NOTE OF EVIDENCE ON BEHALF OF  
              CLAIMANT.

Filed February 1, 1922.

United States District Court, Eastern District of  
Louisiana.

Armour & Co.,  
vs. No. 15,811, In Admiralty.  
Steamship "Fort Morgan."

Note of Evidence on behalf of Fort Morgan Steamship  
Company, Ltd., and objections to evidence and exhibits  
offered by opponents:

Be it remembered, that on this, the Eleventh day of  
June, A. D. 1920, in open Court, on the trial of this  
cause, proctors for the Fort Morgan Steamship Com-  
pany, Ltd., offered, produced and filed in evidence the  
following testimony and documents:

First: Depositions of Thomas Johannasen and Rob-  
ert T. Burge, taken at Los Angeles, California, and  
exhibits thereto annexed.

Second: Deposition of Captain Olaf H. Olsen, and  
statement of Victor Leovy, taken at New Orleans, Feb-  
ruary 28th, 1920, and all exhibits thereto annexed.

Third: Settlement agreement, marked Defendant, Chicago 1., offered in connection with testimony of Victor H. Munnecke at Chicago, at page 22 thereof.

Fourth: Agreement of October 3rd, 1917, marked Defendant, Chicago 3, offered in connection with deposition of Ed. J. Mitchell at Chicago, at page 62.

Fifth: Copy of petition and order in suit of The Central American Cattle Co., Inc. vs. Armour & Co., No. 122,470, Civil District Court, Parish of Orleans, Louisiana.

#### OBJECTIONS TO TESTIMONY.

And said Fort Morgan Steamship Company, Ltd., by its proctors repeated and insisted upon in open Court, the following objections reserved in the taking of depositions:

First: Objection noted on page seven of testimony of Victor H. Munnecke, at Chicago, to any testimony tending to contradict or vary the written contracts filed in evidence or to prove indirect or remote damages.

Second: Objections, as *res inter alios actae*, to report of survey, translation and letter, offered at Chicago, in connection with testimony of A. G. Frisbie, page 69.

200 Third: Objection noted in testimony taken at Chicago, of W. C. Kirk, page 75, to testimony as to meaning of settlement agreement, on the ground that written agreement is best evidence.

Fourth: Objection noted at page 21 of testimony of Capt. Thomas Johannasen, taken at Los Angeles, to all statements of the master which are claimed as binding on owner.

Fifth: Objections to report of survey, same testimony, page 116.

Sixth: Objections noted on page 5 of testimony of O. R. Whilden, to the effect that services by the master paid for by Mr. Whilden, were not on behalf of the owner, and on page 7 to alleged statements and agreement by the master as hearsay and *res inter alios actae*, and on page 10 of same testimony, to documents offered as hearsay and *res inter alios actae*.

(Signed) DENEGRÉ, LEOVY & CHAFFE,  
Proctors Fort Morgan S. S.  
Co., Ltd.

201

## NOTE.

Respondent's Exhibit Chicago-1, same as Defendant's Exhibit Chicago-1, copied at page 178 of this transcript.

\* . . . . \*

Respondent's Exhibit Chicago-3, same as Defendant's Exhibit Chicago-3, copied at page 187 of this transcript.

\* . . . . \*

## 209 DEPOSITIONS ON BEHALF OF CLAIMANT.

Filed February 1st, 1922.

In the District Court of the United States for the Eastern District of Louisiana, New Orleans Division.

Armour & Company,  
vs. No. 15,811, In Admiralty.  
Steamship "Fort Morgan." Central American Cattle  
Company, Inc., called in by Claimants.

Reporter's Transcript of Depositions of Thomas Johann-  
sen and Robert T. Burg on Behalf of Fort Morgan  
Steamship Company.

Los Angeles, Cal., September 17 and 18, 1919.

• • • • •

211

## STIPULATION.

In the District Court of the United States for the Eastern District of Louisiana, New Orleans Division.

Armour & Company, Libelant,  
vs. No. 15,811, In Admiralty.  
Steamship "Fort Morgan"; Central American Cattle  
Company, Inc., called in behalf of Claimants.

It is hereby agreed by and between counsel for the Fort Morgan Steamship Company, Mr. Victor Leovy, representing Messrs. Denegre, Leovy & Chaffe, proctors;

by counsel for the Central-American Cattle Company, Inc., Mr. W. W. Young, representing Messrs. Terriberry, Rice & Young, proctors, and by counsel for Armour & Company, Messrs. John D. Grace and M. A. Grace, proctors, that these depositions may be taken down in shorthand and transcribed by the reporter, the signing, sealing and certification to be waived, and that four carbon copies shall be made, one for each of the counsel interested in the case, all to be taxed as costs.

212 Pursuant to the foregoing stipulation and to the notice hereto attached dated August 6, 1919, the following depositions were taken in the office of Messrs. Flint & McKay, attorneys-at-law, suite 1046 Title Insurance Building, No. 456 South Spring Street, in the city of Los Angeles, county of Los Angeles, state of California, on Wednesday, September 17, 1919, commencing at the hour of 11 o'clock in the forenoon of that day, and on Thursday, September 18, 1919, commencing at 11 o'clock in the forenoon of said day, before John P. Doyle, Notary Public in and for the county of Los Angeles, state of California.

Appearances:

John D. Grace, Esq., of the firm of John D. and M. A. Grace, of New Orleans, Louisiana, counsel and proctors for Libellant;

Frank P. Flint, Esq., of the firm of Flint & McKay, of Los Angeles, California, counsel and Proctor for Respondent.

Central-American Cattle Company, Inc., not represented, but duly served with notice, as per original copy of notice hereto attached.



213        THOMAS JOHANNASEN, a witness called  
              on behalf of the Fort Morgan Steamship Com-  
 pany, Ltd., claimant, respondent and petitioner, having  
 been first duly sworn, testified as follows:

Direct Examination.

By Mr. Flint:

Q. Please state your name and residence.

A. Thomas Johannasen. It has now been two years ago since this thing occurred, and I just say what I can remember as to the dates.

Q. Where do you reside?

A. In Lomita, California.

Q. What is your occupation?

A. Dredger man.

Q. What was your occupation in the month of November, 1917, and previous thereto? What was your occupation prior to November, 1917?

A. Master of the "Fort Morgan."

Q. State what vessels you have sailed and have been in charge of.

A. The steamship "Stofna"; the steamship "Vale," both ships of the same company.

Q. What position did you hold on these vessels?

A. Master.

Q. What other vessels?

A. Prior to that time?

214        Q. Prior to the time of your acting as master of these vessels, what vessels did you sail and what position did you hold?

A. I was on one sailing ship, the "Queen," for about three years, as first mate, and also the "Vergeland" as first mate for six months.

Q. How long were you master of the "Stafna"?

A. About eight months.

Q. And during what period were you master of the "Vale"?

A. About two years and six months. I also have sailed on American boats for about six years—on the "Clearwater" as boatswain, eighteen months, and then on the "Aransas" for eighteen months as quartermaster.

(Last question read.)

A. In 1908.

Q. What type of vessels were the "Stafna" and the "Vale"—steamer or sailing vessels?

A. Steamer.

Q. What tonnage?

A. About 1100 tons.

Q. How long previous to November 29, 1917, had you been master of the steamship "Fort Morgan"?

A. About fifteen months.

Q. During that period how many voyages had you made with the steamship "Fort Morgan"?

A. I made a good many trips. I don't remember them all. I made three trips to New Orleans in  
215 a month, between Cuba and New Orleans.

Q. Were you making continuous trips from the time that you first became master of the steamship "Fort Morgan" until November 29, 1917?

A. Yes, sir.

Q. State the nature of the cargoes that were carried on the ship on these trips.

A. Four cargoes of bananas, and one cargo of cattle prior to that last one, and several cargoes of corn, and hogs on deck, to Havana from New Orleans, and generally hauled sugar from Cuban ports to New Orleans.

Q. In the cargo of cattle that you carried previous to November 29, 1917, between what ports were the cattle carried?

A. Port Cortez to Havana.

Q. During the week preceding the 29th of November, 1917, where were you and the steamship "Fort Morgan"?

A. In Port Limon.

Q. From what port had you sailed on the trip to Port Limon?

A. New Orleans.

Q. On what day did you sail from New Orleans?

A. I don't remember.

Q. About how many days prior?

A. About the 20th of November, I should say, or the 29th.

Q. How many days did it take you to make  
216 the trips?

A. Three and a half days at least. Well, I am not sure of that date; I can't remember that.

Q. At the time of parting from New Orleans was the steamship "Fort Morgan" seaworthy and all of its equipment suitable and in proper condition and repair to have rendered it seaworthy and capable and adequate to perform the services in carrying the nature, kind and character of freight for which it had been built, constructed and equipped, and for which it had ordinarily been engaged and employed?

Mr. Grace:

That is objected to on the ground that whether the vessel was or was not seaworthy is a question of law to be determined by the Court; and for the further reason that the question is too general in its terms.

A. Yes, it had just been drydocked and passed by the Lloyd Survey and everything was fixed up in good shape and good order.

Q. Were the water ballast tanks in proper and suitable condition for the storage of water therein for the purposes for which said tanks had been and were being used?

Mr. Grace:

That is objected to as leading and suggestive.

A. The tanks were all passed by the Lloyds.

By Mr. Flint:

Q. Did you examine them?

A. No, sir. The engineer examined them on my orders.

Q. And did he make any report to you?

A. No, sir. He reported to the Lloyds.

Q. From the time of the departure from  
217 the port of New Orleans to the port of Limon  
had any repairs been required and made in said  
tanks from the arrival of said vessel at the port of  
Limon?

Mr. Grace:

That is objected to as leading and suggestive.

A. No.

By Mr. Flint:

Q. Was the said vessel and its equipment of every kind and nature, including said tanks, in proper and suitable condition for the performance of the functions of said vessel and said equipment?

Mr. Grace:

That is objected to as leading and suggestive.

A. Yes, sir.

By Mr. Flint:

Q. While lying at the port of Limon, before the cattle were placed on board, had any repairs or alterations been made in said vessel?

A. Yes, sir. Repairs was made that was needed for the care of the cattle.

Q. Who made those repairs?

A. They were made by the United Fruit Company's men; the captain of the steamer force of the United Fruit Company, and by Mr. Wilkinson for the cattle company.

Q. State in detail just what repairs or changes were made to the vessel at Port Limon.

A. Well, their fruit deck that was put in in New Orleans was finished at Port Limon, and so was the shifting-boards, was well secured, and also stalls put up for the cattle under inspection of two of

218 Armour's men.

Q. On what decks were the stalls placed?

A. All over; on all the decks.

Q. By "all the decks" what do you refer to? How many decks did you have?

A. The lower deck, the fruit deck, between deck, and the main deck, where the deck loader was, where the cattle was also put in the stalls on the main deck.

Q. Did you have anything to do with the placing of stalls in the decks?

A. Not any more than for the security of the ship. The rest was left to Armour's men.

Q. How many decks on the steamer were stalls placed in?

A. Stalls were on all the decks.

Q. How many are there?

A. Four decks forward. The bottom and two decks, and also the main deck. All decks forward. On aft, the lower hold, between deck, and the upper deck.

Q. Can you describe the manner in which the stalls were placed and the shifting-boards placed on the various decks?

A. I can't explain it any other way than it was arranged so that the cattle could be taken in from the hatch into each stall, and there was from eight to twelve cattle in each stall.

Q. Uprights made between the decks?

A. Uprights made between the decks, and also shifting-boards crossways to keep them in the stalls;  
219 and the cattle in there was tied with a rope of about three feet—just long enough to reach through to get their feed to live on.

Q. How many days prior to your sailing was this work commenced?

A. About three or four days before. As soon as we discharged our general cargo. As soon as the general cargo was discharged the work was going on to fix the boat for the cattle.

Q. How long prior to your sailing was the work completed?

A. Oh, they were continuing the work until she was loaded.

Q. Who furnished the lumber for the stalls and the shifting-boards?

A. It was furnished by the Central-American Cattle Company in New Orleans and by the United Fruit Company in Port Limon. That is my belief; I don't know.

Q. Did you order the lumber?

A. No, sir.

Q. Did you employ the men?

A. No, sir; Mr. Whilden employed them.

Q. Did you pay them?

A. No, sir.

Q. Do you know who did?

A. Mr. Whilden, I guess, I am not sure.

Q. Who acted as superintendent and directed the performance of said work by the laborers engaged thereon?

A. The captain of the United Fruit Company. I don't know what his name is now. Captain Heckman I believe it was.

Q. Who directed and gave orders to the men engaged in performing the labor of putting in the stalls and shifting-boards?

A. Mr. Heckman.

Q. If you were consulted regarding such construction, alterations and modifications, and placing of equipment on said vessel, and the methods and means of doing said work, state who consulted you and what was said?

A. Well, I was there the whole time looking after it. Whatever change should be done I was asked about, and I done it for the safety of the cattle and the ship.

Q. Had you been authorized or directed by Mr. Burge or the owner of the vessel or any other person to consent or agree to the equipment of said vessel in the special manner it was then being altered and equipped on this occasion?

A. No, sir.

Q. Did at any time Mr. Burge or the owner of the vessel give you any instructions about that?

A. Yes; to follow the Central Cattle Company's order that was the charterer of the ship.

Q. Were the instructions given to you as to the general movement of the steamer or specifically  
221 for the equipment for carrying the cattle at Port Limon on this trip?

Mr. Grace:

That is objected to as leading and suggestive.

Mr. Flint:

Well, strike it out, because he cannot understand it.

Q. Now, were the instructions given you for this particular trip?

A. No, for the whole time while she was under charter.

Q. Were you authorized or directed by Mr. Burge or the owner of the vessel or any other person to consent or agree to the fixing of the vessel with stalls and shifting-boards?

A. No. I was asked which is the best way to fit the ship out, and I told them to put the extra deck in because it will be better for the ship, as previous to that she only had one deck when she had cattle from Port Cortez to Havana. That made the ship steadier.

Q. The cattle were loaded on how many decks below the main deck?

A. Two forward and one aft.

Q. How many head of cattle did you have aboard?

A. About 440, I think. It was 425, I think.

Mr. Grace:

420, is it not?



The Witness:

420, yes.

By Mr. Flint:

Q. On the previous trip that you made on the "Fort Morgan" in carrying cattle how many did you have aboard on that trip?

A. About 550.

222 Q. And they were loaded on how many decks below the main deck?

A. One deck forward, and one deck aft.

Q. In the loading of the cattle on this trip were there as many cattle above deck—or on the main deck—as on the previous trip?

A. About the same. There was a few more on deck from Port Cortez than from Port Limon.

Q. Who planned the placing of the stalls and shifting-boards on the vessel?

A. Mr. Wilkinson, representing Armours.

Q. Did you in any way attempt to direct how the shifting-boards or the stalls should be constructed?

A. Yes, I directed the shifting-boards. The stalls was left to him, and I told him that on the previous trip I had no stalls at all except a few.

Q. The shifting-boards were placed for what purpose?

A. For to keep the cattle on each side and not shift them from one side to the other.

Q. From one side of the vessel to the other?

A. The shifting-boards were put up in the middle of the ship to keep the cattle so that if the ship turned over they would stay on the one side.

Q. You had no authority from Mr. Burge or the Gulf Coast Fruit & Steamship Company to consent, agree,

223           or acquiesce in the altering or modification of  
the equipment of said vessel?

Mr. Grace:

That is objected to as leading and suggestive.

A. No.

By Mr. Flint:

Q. On this occasion?

Mr. Grace:

Objected to as leading and suggestive.

A. No.

By Mr. Flint:

Q. Any suggestions that you made in reference to placing the stalls or the shifting boards were on your own motion?

A. Yes, sir, on my own motion. I didn't give no direction of any kind at all on the stalls, as Wilkinson, the man sent from Armour, said he had carried cattle on other boats to Europe, and it was left to him to fix the stalls up.

Q. When did you complete loading the vessel?

A. On the 29th—if that is the date—is it?—the 29th, about 6 o'clock P. M.

Q. The 29th of what month?

A. Of November.

Q. Of what year?

A. 1917.

Q. How long after you had completed loading before you sailed?

A. We sailed soon after she was finished loading.

Q. Who had charge of the loading of the cattle?

A. Captain Heckman, together with Mr. Whilden and Mr. Mitchell and Mr. Wilkinson of the Armour cattle company.

224 Q. State in detail the manner and the place upon the steamer where the cattle were placed and who directed the placing of the cattle so placed.

A. Well, they were placed in all the stalls in the hold as directed by Armour's man.

Q. How did they come on board the vessel?

A. They were driven in the gangway from the cars into the ship, and they were loaded on the hold with a canvas strap on the belly.

Q. When the cattle reached the hold who directed where they should be placed?

A. Wilkinson, Armour's man.

Q. State in detail what transpired from the time of casting off from the wharf to the time you returned to Port Limon on the 29th day of November, 1917.

A. When the ship left the wharf with pilot on board, he left the ship in the middle of the bay. I took charge, took the ship out, and while passing around the key and getting out to the ocean, the ground-swells were pretty heavy and the first swell turned the ship over pretty heavy and the cattle fell down and couldn't get up, and also the bunkers shifted over. While proceeding until about 15 mile off shore the ship listed more and more, and the officers were called up on the bridge, and also Wilkinson, and were asked by me if we could proceed, to which they said no, and Mr. Wilkinson said  
225 the best thing was to turn back to save the cattle. In the meantime everything was done with the bunkers to try to straighten the ship

up, which couldn't help any. So the ship was turned back and anchored in the port, and blew the whistle for assistance, and Captain Heckman acted as pilot, and some more came alongside.—No, that is a mistake. I went a little too far. And while nobody came aboard—after blowing the whistle for assistance nobody came out. I took the ship's boat, went ashore and got Captain Heckman and some more out to the ship, which had about a 45 degree list. She was taken alongside the wharf early in the morning. The cattle was discharged on the wharf and the dead cattle was put in piles and the live ones sent in the fields. When all the cattle were-discharged the dead was taken in again and two inspectors from the government was on board and ordered us to take the ship twenty miles to sea and throw them overboard. They also was split open and turned overboard so they shouldn't float around. On the same day, in the evening, she returned back to Port Limon in the same condition as when she left New Orleans.

Q. What was the list of the vessel when you left port?

A. About seven degrees.

Q. What was the list of the vessel after the groundswell struck you?

A. About 45. She was about 45 degrees when she arrived back again.

Q. Who examined the vessel when you returned back to Port Limon?

A. Captain Heckman, and also another captain, I don't know his name.

Q. Did they inspect the vessel?

A. Yes. She was inspected by them, tanks and all.

Q. They represented Lloyd?

A. One of them did.

Q. Did they make a written report of that inspection?

A. Yes, sir.

Q. Who was that report given to?

A. I don't know.

Q. It was not given to you?

A. No, sir.

Q. Do you know what the report was?

Mr. Grace:

That is objected to on the ground that the report is the best evidence of what is contained therein.

By Mr. Flint:

Q. What was the report, if you know?

Mr. Grace:

Objected to upon the ground that if the report was given in writing, the written evidence thereof is the best evidence.

A. To my knowledge the report was given out that the ship was in good condition.

By Mr. Flint:

Q. Did you inspect the ship yourself?

A. Yes, sir.

Q. What was the condition of it?

A. I found her in the same condition as she was when I arrived at Port Limon, except a few shifting-boards and planks were pulled to pieces by  
227 the shifting of the cattle.

Q. Was the vessel in the same shape as she was when you left New Orleans for Port Limon?

A. Yes, sir, except a few things was changed in the cattle fittings.

Q. With the exception of the fittings that had been placed on for stalls and shifting-boards for the cattle, the vessel was in the same condition as when you left New Orleans?

A. Same condition, yes, sir.

Q. Was the vessel, when she returned to Port Limon, seaworthy in every respect?

Mr. Grace:

That is objected to on the ground that the question of seaworthiness is one to be determined by the Court, after learning all the facts in the case and not for the witness to pass upon.

A. Yes, sir.

By Mr. Flint:

Q. What was the condition of the water tanks on the vessel?

A. Good condition, as to my knowledge.

Q. Did any of the tanks leak?

A. Not except one drinking tank for the ship's crew.

Q. How large a tank was that?

A. It would hold about a ton of water.

Q. Where did it leak?

A. On top. It had never made any damage. We had been drinking the water right along, and it never made any damage to the ship's cargoes. It didn't leak enough to make any damage.

228 Q. Would the water come from this leak in the tank in any great amount?

A. No.

Q. It was on the top of the tank?

A. Yes. The tank was up between decks.

Q. When would the water leak out of the tank, if at any time?

A. When it was a heavy sea, when she rolled and splashed.

Q. And the only time it would leak was when you did have a heavy roll?

A. Yes. Well, yes, it will.

Q. Was the tank filled with water?

A. It was partly used up.

Q. Who used that water?

A. For the crew, for the ship's use.

Q. Were the other tanks in the vessel filled?

A. Yes, sir.

Q. With what kind of water?

A. Fresh water.

Q. Were the water tanks in suitable and adequate condition and proper and adequate at the time of your departure from the port of Limon on the 29th day of November, 1917?

Mr. Grace:

That is objected to as leading and suggestive; and, further, as tending to usurp the function of the Court, which is to determine the fitness or unfitness of the tanks.

A. Yes, sir.

229 By Mr. Flint:

Q. Who was present at the conference on the boat when you decided to return to port?

A. The mates and engineers and Mr. Wilkinson.

Q. How long after the discharge of the dead cattle and the removal of the live cattle at Port Limon did you remain at Port Limon?

A. Two or three days.

Q. During that period what took place in regard to the removal of the stalls and shifting-boards that had been placed upon said vessel for the purpose of carrying the cattle?

A. Part was taken away and part as they were when they came from New Orleans.

Q. Who took them away?

A. The ship's crew took some away. They cleared the deck, the stalls on deck, and a part of it was shifted by the stevedores in New Orleans.

Q. For what port did you sail after you left Port Limon?

A. New Orleans.

Q. Did you take a cargo of freight of any kind aboard at the time of this last trip?

A. Went home in ballast—empty. Water ballast.

Q. During the period that you lay at Port Limon, after your return with the cattle, and up to the time of your departure from Port Limon, did you cause  
230 to be made or were any repairs made to the tanks in said vessel?

A. Nothing at all.

Q. Or to the vessel itself?

A. No.

Q. Or its equipment?

A. No.

Q. The tanks were in the same condition on your departure from Port Limon as they were at the time of your attempted departure on the 29th day of November, 1917?



A. Yes, sir. They were full ballast. The water was used for the home trip.

Q. About when did you arrive at New Orleans?

A. About three or four days after we left Port Limon.

Q. During the trip from Port Limon to New Orleans were there any repairs or other work performed on said tanks?

A. No, sir.

Q. On the trip over?

A. No repairs at all.

Q. Were any repairs made to the vessel or its equipment during the trip over from Port Limon to New Orleans?

A. No, sir.

Q. At the time of your arrival at New Orleans the vessel and its equipment and tanks were in the same state of repair and condition as they had been at the time of your first departure from New Orleans for Port Limon for the cattle?

A. Yes, sir, exactly the same.

Mr. Flint:

That is all.

231

Cross Examination.

By Mr. Grace:

Q. Captain, I show you bill of lading which is marked on the left-hand side "Libelant's Exhibit A-1" and ask you if that is the original bill of lading signed by you as the master of the steamship "Fort Morgan" (handing document to witness.)

A. Yes, that is my handwriting.

Q. And this one I show you, indorsed "U. S. District Court, Eastern District of Louisiana New Orleans Division, filed January 25, 1918, H. J. Carter, Clerk,"—that is a copy of the original, is it not (handing document to witness)?

Mr. Flint:

Objected to on the ground that said testimony is irrelevant, incompetent and immaterial, and on the further ground that the master is without authority to bind or represent the owners in this regard or in regard to the direction of the cattle fittings, or otherwise, and on the further ground that whatever was said or done by the said master in and about giving information as to the fittings or doing any act in connection therewith or commenting on the kind, character and nature thereof was done on his own account and without the knowledge, authority, consent or understanding of the owner, and it is agreed that this objection may be considered as made to all alleged statements of the captain, and in relation to testimony as to any acts or  
232 things by him done in relation thereto without the necessity of repetition.

A. Yes, that is a copy of the original.

Mr. Grace:

The document produced and identified by the master as the original is offered in evidence and surrendered in this cause for cancellation or such other action as the Court may order.

Q. Captain, what did you say your present occupation is?

A. Dredging for the government.

Q. Now, you said there were no repairs made to the tanks during the course of your voyage from Port Limon to New Orleans.

A. No, sir.

Q. Were any repairs made at New Orleans?

A. No, sir, not so far as I know.

Q. Those tanks have never been repaired,  
233 so far as you know since the cattle were laden  
on board at Port Limon?

A. No, sir.

Q. Now, Captain, you say the tanks had water in  
them. Do you mean all of the tanks?

A. All of the bottom tanks.

Q. What do you mean by "bottom tanks"?

A. The bottom tanks and the ballast tanks in the  
bottom of the ship.

Q. Well, that ship, as I understand, had no tanks  
either under her engine room or boiler room.

A. No, sir. She had in the forward hold, and in the  
aft hold. No. 1, 2 and 3. That is No. 3 in the aft hold.

Q. Did you have a forward peak tank?

A. Yes, sir.

Q. And an after peak tank?

A. Yes, sir. And two loose tanks for ship's use al-  
so, in between deck.

Q. I want to get the location of these tanks. Now,  
first of all have you a plan of the steamship "Fort  
Morgan"?

A. No, I have not.

Q. Do you know where we could get a plan of that  
steamship which would indicate the position of those  
tanks?

A. No; there was only one plan aboard the ship,  
and that follows the ship.

Q. You don't know whether the owners have a copy  
of that plan or not?

A. No. I don't think they have, because  
 234 the one that was there was in very bad condition when I came there. But I thought the United Fruit had one—a couple of them.

Q. Now, with respect to the location of this No. 1 tank, where was that at?

A. That is in the forward hold, forward.

Q. That is not the forward peak tank?

A. No, that is in the bottom.

Q. And then in addition to that No. 1 tank which you say was at the bottom you had a No. 2 tank?

A. Yes. That is in No. 2 hatch, in front of the bunker bulkhead.

Q. And back of the No. 1 tank?

A. Back of No. 1.

Q. Now, that No. 2 tank, did it have any compartments in it?

A. Yes; a bulkhead in the middle.

Q. So that No. 2, then, was divided into two wing tanks?

A. Two wing tanks, yes, sir.

Q. And the No. 3 tank was where?

A. Was aft, in the after hold.

Q. Aft of the engine room?

A. Yes, sir.

Q. And then after that, or above that, was the stern peak tank?

A. After that.

Q. Above the No. 3?

A. Above the No. 3.

235 Q. When this vessel left Port Limon did she have water in the fore peak tank?

A. No, sir.

Q. Why not?

A. I can't sure remember whether she had or not. I can't quite remember the peak tank. Of course it was very seldom filled.

Q. And you don't know, then, when you left Port Limon, whether you had water in the fore peak tank or not?

A. I don't remember.

Q. And the after peak tank, did you have water in that when you left Port Limon with these cattle?

A. No, I don't think we had, because they were left to pump salt water in in case of emergency.

Q. So then you are not able to say at this time whether or not, on November 28 or 29, 1917, when you left Port Limon with the cattle on board concerned in this suit,—whether or not you had any water in the fore tank or in the after peak tank?

A. No, I can't say.

Q. Captain, have you got the ship's log with you?

A. No. It is on the ship.

Q. And where is the ship?

A. I don't know.

Q. Do you know whether she belongs to the same owners?

A. No, she changed companies.

236 Q. For what period of time did you keep your logs; that is to say, whether they were yearly logs or six weeks logs or monthly logs?

A. They used to keep the log until it was filled up, and then—there was no certain time for the log. Every time it was filled out I would get a new one.

Q. Have you got the engineer's log?

A. No, sir. That is on the ship.

Q. You don't know where that is?

A. No, sir. It follows the ship as a general rule.

Q. Well, you know, Captain, as a matter of fact, that when a log is filled out it is turned in to the owners, don't you? When you fill your log out you turn it in to the owner, don't you?

A. Yes, if it don't follow the ship. But as a rule the ship's logs are laying there for ten or fifteen years, since the ship commenced, because if any case comes up, you bring the logs of the ship to Court.

Q. And in this case which has come up you haven't got the log books to bring into Court?

A. No.

Q. Either the master's log or the engineer's log. Do you know whether or not there is an entry in the engineer's log that you had leaky tanks?

A. Not except the fresh water tank, and that had nothing to do with the passing of the ship.

237 Q. Do you know whether or not in the ship's log you had any entry of leaky tanks?

A. No.

Q. Do you know whether you did or did not?

A. I don't know whether we put anything in there.

Q. You don't know whether it is there or not?

A. No, sir, except it was put in from the fresh water tank leaking, as after the ship was passed in drydock, just before, they find the bottom tanks in good condition—the Lloyd survey.

Q. Did you make the survey?

A. No; it was done by Lloyd's survey agency.

Mr Grace:

Then I object to the testimony of the witness in regard to what third parties are reputed to have found, and ask that this statement of the witness be stricken out.

Q. Now, what we want to get is what you know personally. Is it not a fact that the chief engineer reported to you that the ballast water tanks were in a leaky condition?

A. Nothing except the drinking tank.

Q. How is that?

A. Nothing so far as I know except the drinking tank.

Q. Do you remember whether he made a report to you that your ballast tanks were leaky or not?

A. No, sir.

Q. You don't remember?

A. I don't remember.

238 Q. Did your owners ever ask you as to what the cause of that vessel listing over so, finally to a 45 degree list, was?

A. Well, because was the cattle—the cattle falling down, and—

Q. No, I didn't ask you what the cause was. The question is, did your owners, Mr. Burge, the president of your company, for instance, or any other officer of the company owning the "Fort Morgan" ever ask you as to why it was that that vessel turned over that way?

A. No, sir, nobody asked me.

Q. Never made any inquiry of that kind?

A. No, sir.

Q. Did you ever make any statement to the president of the company stating why it was or what cause it was that brought about this turning over of the vessel on one side?

A. I may have mentioned that the cause of it turning over was that the cattle was tied fast and the ship listed, and the decks wet from the cattle having been standing there, and water from the tanks, and while

the ship listed the cattle slide and couldn't come up. And, as I explained one time, when I loaded a ship before, with the cattle loose in the hold, she didn't list whatsoever. But this time I believe if the cattle had been loose they would have walked against the opposite side when she turned over, which they couldn't have done, being tied.

239 Q. Now, coming back to the question again, did you ever make any report or write any letter or send any telegram or cablegram or wireless to the owner setting out why it was, in your opinion, that that vessel turned over to that degree?

A. No, sir.

Q. None at all?

A. No, sir. Of course, Mr. Whilden was representing the company at that time, and he was there himself.

Q. Mr. Whilden was representing what company?

A. The steamship.

Q. And he was representing what company?

A. The Fort Morgan Steamship Company.

Q. Captain, I show you a radiogram sent out from Limon bearing what purports to be your signature, addressed to Mr. Burge, which reads: "Limon, December 4, 1917. Ellis, New Orleans. Burge All cattle floated properly. Disaster caused by ballast tanks and heavy seas. Probably sail tomorrow New Orleans. Fort Morgan left port in seaworthy condition. Thomas Johanna-sen, master steamship 'Fort Morgan'." I will ask you to look at that signature and state whether or not that is your signature to that document, and if it is not a fact that you sent that wireless to the owner (handing paper to witness).



A. Yes, I sent that; but I meant after the—the question you put to me,—I mean after she arrived  
240 in New Orleans. It was after she arrived in New Orleans, after the thing was over. I didn't understand the question you put to me.

Mr. Grace:

The radiogram identified by the witness is offered in evidence in connection with the cross-examination of the witness, and for the purpose of identification is marked "Armour Exhibit B-1."

Mr. Flint:

I object to the introduction of the document as incompetent, irrelevant and immaterial; and for the further reason that the original is the best evidence.

241 By Mr. Grace:

Q. Now, that wireless or radiogram that I showed to you, wasn't that sent over in answer to this one dated New Orleans the 3rd of December, 1917, signed "Burge" (handing paper to witness)?

Mr. Flint:

I object to that on the same grounds, and that the original is the best evidence, and it has not been shown that it has been lost or destroyed or that it cannot be produced.

A. Yes, that is my name.

Mr. Grace:

The radiogram identified by the witness as being in response to the one previously identified by the witness as sent by himself I offer in evidence herein and ask that it be marked "Armour's Exhibit 'B-2.'" This one reads:

"New Orleans, 3rd December, 1917. 6:50 P. M. Limon. Fort Morgan. Port Limon. Advise if cattle properly loaded, also what caused accident and when will sail. Burge."

Q. Now, in the reverse side of that radiogram is a copy of two wires sent by you—and that copy is signed by you, is it not, in the presence of witnesses (handing document to witness)—

A. Yes, sir. Can I explain a little bit here?

Q. Yes, make any explanation you want to.

A. (Witness reading from radiogram) "All cattle were properly loaded. Disaster caused by ballast tanks and heavy seas. Probably sail tomorrow. New Orleans."

Can I explain what "ballast tanks" means there?

242 It means they were taking water from the ballast tanks to give the cattle water to drink.

Q. That is the interpretation that you place on this wireless—that when you say the disaster was caused by ballast tanks you mean that they were taking water out of ballast tanks?

A. Yes; drinking water for the cattle.

Mr. Grace:

We offer in evidence the cablegram in question and the two typewritten signed messages on the reverse side of the cablegram.

243 The Witness:

Now, I made a mistake there when you asked me a question. The question you gave me there was if I ever had any telegram or any question from the owners and I said no, but by that I meant after I came back to New Orleans.

By Mr. Grace:

Q. But the question I put to you did not confine you to any time, whether before or after you got back to New Orleans.

A. Well, but I took it that way.

Q. I asked you as plainly as I could whether you had received any message or request from the owners as to what the cause of the disaster was, and you answered clearly that you had not. Now, of course, these messages are before you.

Mr. Grace:

The exhibit produced and identified by the witness, both as to the face of the message and the indorsements on the back are offered in evidence on behalf of Libellant and marked, for the purposes of identification. "Armour Exhibit B-2."

Q. Now, Captain, did you send any message to the owner from Port Limon with regard to anything relating to the physical condition of the vessel—whether she needed any repairs or anything done to her?

A. Well, I sent him telegrams, but—in fact I can't remember.

Q. Did you send them any radiograms or cablegrams or telegram, as you term it, or any letter of advice that the tanks were in need of repairs, that the  
244 vessel was in need of docking or repairs or anything of that kind?

A. No, I didn't send no letter at all; I know that; but the telegrams you have got there, that is all I remember sending.

Q. The only ones that you remember having sent is what have been produced to you here by me?

A. Yes.

Q. And you sent no other that you recall?

A. As well as I remember.

Mr. Grace:

I produce radiogram dated December 5, 1917, reading:  
"To Ellis, New Orleans"—

Mr. Flint:

I object to that unless it is shown to be the original radiogram.

By Mr. Grace:

Q. I produce here what purports to be a radiogram sent by the Tropical Radio Telegraph Company and purports to carry your signature at the bottom of it, and ask you whether or not you sent that message to the owner. The radiogram is dated Port Limon, Costa Rica, December 5, 1917 (handing same to witness).

A. That don't mean repair; that means—

Q. No; but first of all, did you send that?

A. Yes, I sent that, yes.

Mr. Grace:

The document identified by the witness as a message sent by him, as shown therein, is offered in evidence in connection with the cross-examination of this  
245 witness, and for the purpose of identification is marked "Armour Exhibit B-3."

246 By Mr. Grace:

Q. In addressing these radiograms, "Ellis, New Orleans," and then below that "Burge", that was sent to New Orleans for delivery to Burge, was it?

A. Yes, sir.

(A recess was thereupon taken until 2 o'clock P. M.; whereupon, the witness Thomas Johannasen being recalled, the cross-examination was resumed by Mr. Grace as follows) :

Q. Captain, you spoke about a tank that leaked at the bottom; that is to say, when the ship would roll the water would come out from the top. Was that tank closed over?

A. Yes; there was a cover on it. There was a man-lock on it— a manhole, and there was a man-lock on it.

Q. And would it leak at this manhole you speak of?

A. It leaked around the—the plate was worn loose in it.

Q. Holes had been rusted through the top covering of it?

A. Yes.

Q. And when the water would splash inside it would splash out through these rust holes?

A. Yes.

Q. They were rust holes, were they?

A. Yes.

That was a loose water tank, a loose fresh-water tank for the ship's use.

Q. And that tank was located where?

247 A. Between decks.

Q. That was not a ballast tank, then?

A. No, sir.

Q. You would not carry a ballast tank in between decks?

A. No, sir.

Q. So, therefore, in your radiogram when you say the disaster was caused by ballast tanks you mean by the tanks that were down in the hold?

A. Well, yes; them tanks, of course they were taking fresh water off for to use with the cattle while loading them and while going out.

Q. What was the idea of putting water in those ballast tanks?

A. To have fresh water for the cattle. There was no other place to put it.

Q. What was the ship going to do for ballast?

A. Well, the only way to do was in case one tank was used to fill up full of water from the outside.

Q. In case one tank was used to do what?

A. To fill it from the outside—from sea water.

Q. But you would have to empty that tank first, would you not?

A. It would be emptied first.

Q. And that would leave the ship without that much ballast on that side?

A. Yes, sir. She wouldn't have to be emptied, except to keep the water for the cattle.

We could throw the water in together with the fresh water in case we needed it.

Q. Well, in case of need, as you say, you would pump the water from the outside, then, sea water, into whatever was left of your fresh water in the tank?

A. Yes.

Q. And that would spoil that water for cattle or for any other purposes, would it not?

A. Yes, sir.

Q. You made no provision for any ballast, then, in your ship to take the place of the water that was being taken out of these ballast tanks?

A. No, sir; because she didn't have it at the time before when she had cattle.

Q. Now, what is the idea of carrying ballast in a ship, Captain?

A. To steady the ship off in case of heavy water.

Q. In other words, the ballast is intended to give the ship stability?

A. Stability, yes, sir.

Q. So that no matter how heavy the ground-swells may be or no matter how heavy the waves at sea may be the ballast is intended to keep her upright?

A. To keep her upright and to keep her down for the working of the propeller.

Q. Now, you say they took the water out of  
249 the ballast tanks for the purpose of watering the cattle?

A. Yes, sir.

Q. And that meant taking the weight out from the bottom of the ship?

A. Yes, sir.

Q. And the more weight you take out of the bottom of the ship the more tender she becomes, doesn't she?

A. Yes, sir.

Q. The more liable she is to roll over?

A. Yes, sir.

Q. As a matter of fact, Captain, even before your vessel pulled away from the dock to start this voyage she had a list to port, didn't she?

A. Yes, sir.

Q. And did you do anything to correct that list while you were at the dock?

A. Yes, sir; we started right away to use the bunker coal from the port side to straighten her back.

Q. But she didn't righten up, though, did she?

A. It helped some, but not altogether. But she always had a list while leaving port before, most of the time.

Q. So while she was lying at dock there, and before you started on the voyage, she had such a list to port that you started shifting your coal from port over to starboard?

A. No; we used it to fire with in the boilers.

Q. In other words, then, you were taking  
250 your coal supply from the port side?

A. Yes, sir.

Q. Between-deck bunkers.

A. Between-deck bunkers.

Q. About how many tons of coal did you have up in between-deck bunkers?

A. Well, I couldn't tell you. I couldn't say that now.

Q. Your log book would show that now, would it not?

A. Yes, the log book would show that.

Q. And you haven't got that log book with you?

A. No, sir.

Q. Have you any idea of how much coal you had up in there?

A. I couldn't say exactly. I couldn't say how much it was. I can't tell how much there was.

Q. Both your log book and the engineer's log book would show that, wouldn't they?

A. Yes, sir.

Q. And you haven't got either one of those books?

A. No, sir. They are all on board. But the deck log book, I don't know whether it will show it or not, but the engineer's book will show everything about the coal.

Q. You said something about the report that was made by surveyors, among whom you said was one for the Lloyds, and professed to be familiar with



251 the contents of that report, at least to some extent. I have here what purports to be a copy of that report, and in it is stated: "On investigation in regard to bunker coal we find this vessel had on board 225 long tons of coal when the loading of cattle at this port was commenced. Of this amount about two-thirds was in the shelter deck bunker." Does that refresh your recollection, Captain, with regard to the quantity of coal you had aboard?

A. No, I don't remember that, because it is pretty hard to remember it; it is two years ago now. That report was signed at Port Limon, was it?

Q. Yes; that is the report I have reference to.

A. Well, that must be signed by the chief engineer. then. The chief engineer was with them when they measured the bunkers.

Q. What was the name of your chief engineer?

A. Johannasen.

Q. Well, his name doesn't appear here. This report is signed by Frederick Heckman, Ingve Sorensen and C. D. Doswell, so I don't see the engineer's name among the signers of this. But what would you say with regard to that statement as to the quantity of coal that was aboard, you knowing what she would ordinarily have on an occasion of that kind? Would that be about right?

A. That would be about right, yes, sir.

252 Q. And with about 225 long tons, would she carry about two-thirds of that in the shelter-deck?

A. Well, I couldn't tell for sure whether she would or not.

Q. Would that be about right—about two-thirds?

A. I couldn't say exactly the amount.

Q. The bottom of the shelter deck bunker was how high above the bottom of the ship?

A. The shelter deck. That means between deck?

Q. The shelter deck bunker. That is where you carried what they report as approximately two-thirds of the amount of coal you had aboard?

A. That is the between deck, then, the shelter deck.

Q. It is referred to here as the shelter deck bunker.

A. It would hold two-thirds, yes. I am not sure. Of course it is a long time ago to remember that, and I never had no measurement on those coal bunkers before.

Q. Now, aside from actual measurement of those coal bunkers, what would you say was the height of the bottom of that bunker from the bottom of your ship—in other words, how high above the bottom of your ship was the bottom of that bunker?

A. Well. I couldn't tell. I have only been in there twice, and I didn't take notice of how high they were.

A. Of course I don't want to hold you down to a matter of inches or right to the foot, but approximately; about.

A. Well, I couldn't say anything about it, because I can't be sure of anything.

Q. You have no idea?

253

A. No.

Q. Well, now, take this place where they have that bunker where two-thirds of your coal was carried, or approximately two-thirds of your coal was carried, how many decks have you below that?

Mr. Flint:

I object to that because it is an assumption that the witness has testified that there was two-thirds of the coal in there.

A. Yes; you see when we left New Orleans we had coal in between deck in front of the bunkers; we had about 45 tons there, and that was used up, and we used some, partly, of the other shelter bunker, or between bunker; I couldn't estimate how much there was left.

Q. The term "shelter deck" referred to in the report you understand and refer to, then, as a between deck.

A. Yes, sir.

Q. Now, take this between deck. How far above the bottom of your ship is that between deck?

A. Somewhere around five feet from the bottom—From the top of the tank to the between deck. About five and a half feet.

Q. Between the top of the tank and the bottom of the deck?

A. Of the between deck, yes.

Q. Now, when you speak of the tank, what  
254 tank are you referring to?

A. The bottom tank; No. 2.

Q. And then how deep is the bottom tank at No.  
2?

A. Well, I couldn't say.

Q. Oh, about.

A. I guess about two and a half or three feet.

Q. How high up above that deck, the deck that is referred to in here as the shelter deck, the deck you call a between deck,—how high up does the coal bunker extend?

A. Well, I don't remember exactly how high that was.—No, that shelter deck is about ten feet above the tank.

Q. The between deck is about 10 feet above the tank?

A. Yes, above the tank.

Q. Not five feet, then?

A. No. That was a fruit deck. I made a mistake then.

Q. Now, let us get this straight. From the top of the tank, and at a distance of about five feet from the top of the tank, there was a fruit deck?

A. Yes, and then from there to the between deck is five feet too.

Q. And then from this fruit deck to the between deck is five feet more?

A. About so.

Q. So that the between deck would be about ten feet or so above the top tank?

A. Yes, somewhere around ten feet.

255 Q. Now, how high up above that deck did the coal bunker extend that was on that deck?

A. Right up to the main deck.

Q. And that would be about how high up?

A. Seven feet.

Q. That would be all the way up to the top deck of the ship, then?

A. Right up to the top deck of the ship, yes.

Q. What is the width of that ship at that place where these bunkers are, about? You understand now I am not trying to hold you down to inches.

A. No, I know; but that is pretty hard to say. You see part of the bunker goes right across the full width of the ship, and part goes on the side.

Q. In other words, that bunker runs from side to side?

A. Well, partly. On the front.

Q. You couldn't give me any idea of the dimensions of that bunker, could you?

A. No, I could not. It is impossible.

Q. Now, you say they were using coal from the port side of that bunker we have been talking about, that you refer to as being on the between decks, and that I stated as referred to in this report here as being on the shelter deck bunker,—they were using coal from the port side of that, you say?

A. Yes, sir.

256 Q. When did you commence using coal from that port side for the purpose of correcting that list?

A. As soon as she started to get listed.

Q. And she started to get that list when?

A. Well, the last time—while finishing loading the ship, a little at a time.

Q. So soon as you finished loading?

A. No, as soon as they started loading she had a little list, and she had the same thing pretty near all the way.

Q. How is that?

A. I say, a little list while starting loading; and she always had a little list to port side.

Q. Now, when you say she always had a little list to the port side do you mean she had a list to port side even before they started loading?

A. Yes, a little bit; but it was not quite noticed.

Q. What I asked you was, did you have a list to port side even before you commenced loading?

A. Yes, a little bit.

Q. Did you have a list to port side when your vessel came to Port Limon on the trip from New Orleans with the New Orleans cargo on board?

A. No. She was heavy loaded then.

Q. Didn't she have a list to port side then?

A. No. She was heavy loaded then with bunker coal.

257 Q. Supposing witnesses who profess to have seen that vessel when she came into Port Limon have said or will say that she had a list to port as you came in, how does your recollection serve you with regard to that?

A. She didn't have no list when we came in. When we were loading the cargo, beginning, she had slightly a list to port.

Q. Would you put your recollection with regard to whether she had or did not have a list when she came in to Port Limon with cargo against the statements of others?

A. No. I can't remember. I never noticed it.

Q. Now, you say as they started loading you noticed she had a list to port?

A. Yes, sir.

Q. And how long did it take them to load the cattle aboard?

A. They loaded partly one day, in the afternoon, and then the next day.

Q. So that on the second day you had completed loading?

A. We had completed loading in the evening.

Q. And during these two days were you using coal from the port side, that is, during that part of those two days while they were loading?

A. Well, during that time in loading I couldn't say exactly, because we were filling water in the tanks the last day in the afternoon when the cattle was coming in.

258 Q. And do you know where they got the coal from for these purposes?

A. New Orleans.

Q. From what part of your ship did they get the coal while they were operating the engine to fill up with water?

A. Oh, no, I couldn't tell; I never noticed it.

Q. Then you don't know whether they got the coal from the cross-bunker down below or not?

A. They took it from the cross-bunkers, of course.

Q. That would be down below?

A. No; on top; between decks.

Q. When did they take that?

A. Well, loading, to fire up with.

Q. Did you see them taking it from there?

A. No, I didn't see it, because I was on deck.

Q. Then personally you don't know where they got the coal from?

A. The engineer was told to use the bunkers on the side it would list on.

Q. But personally you don't know where they got the coal from?

A. No, sir; I never was down in there.

Q. Where is that engineer?

A. I don't know. He may be on the boat yet, I can't say.

Q. Well, as they kept on loading the vessel the list of vessel kept on increasing to port, didn't it?

A. Yes, a little bit—little by little. But  
 259 the ship had—while leaving the United States she pretty near always had a list, previous to that time. While leaving the United States down for the south she always had a list, and most of the time more than that.

Q. Do you think it a good thing for a vessel to be running at sea with a list?

A. Well, it can be straightened up pretty easy by water and coal—using coal.

Q. By shifting your ballast?

A. By shifting your ballast, yes, sir.

Q. That is the proper thing to do, is it not?

Mr. Flint:

I object to that as leading and suggestive.

A. Yes.

By Mr. Grace:

Q. In other words, as a master of a ship, you know it is your business to sail on an even keel?

A. Yes, sir; but we cannot always do that.

Q. You know it is your business to keep your vessel straight?

A. Yes, sir.

Q. As a matter of fact, while you were at Port Limon, and with all the cattle on board, did you attempt then, before leaving the dock, to shift your coal and your water ballast so as to get your vessel perfectly straight before you would leave the dock? Did you do anything then?

A. We started right away to fire the bunker from the port side, and then when she went on the way  
260 out of the harbor the engineer had all he could do to get her straight before we came out, and she didn't have no more list, and there was no danger of the ship when we left the dock.

Q. Is it not a fact that she had a list when you left the dock?

A. Yes, sir.

Q. How many degrees list when you left the dock?

A. About seven degrees.

Q. Was it not more than seven degrees list to port when you left the dock?



A. Not more.

Q. With the vessel having a list to port, that made the deck uneven, didn't it?

A. Well, so little that it wouldn't do any harm.

Q. It made the deck on the port side lower than it was on the starboard side?

A. Certainly.

Q. So that the cattle both below and up on the upper deck were on decks that had an incline to them to the amount of whatever the list of your ship was?

A. Well, while I was taking water off from the tanks to give those cattle water it would slant the same as the deck.

Q. Now, from what tank did they take the water for the purpose of watering the cattle?

A. I couldn't tell. That was left to the engineer.

Q. What tanks did you carry the boiler  
261 water in for steam purposes?

A. The bottom tanks.

Q. What numbers?

A. Well, I guess No. 2 and 3.

Q. Then you were using water out of the bottom tanks for boiler purposes—steam purposes—were you?

A. Yes, I guess he did. It was partly salt water, too, in the boiler. I couldn't say if he used salt water or fresh in the boiler, because sometimes he used salt water and sometimes fresh water.

Q. Now, you know if he used salt water he would be very apt to get his boiler foaming and get it burned.

A. Oh, no; those deep water ships use salt water. They are meant to use salt water.

Q. You are not an engineer, are you, Captain?

A. No, sir.

Q. You have never had anything to do with the feeding of water to those boilers, have you?

A. No, sir.

Q. You don't know where they get the feed water from, then, do you?

A. From the condenser and evaporator.

Q. And as water is lost or wasted you don't know where that is replenished from—from what tank or what place?

A. No. The different times when we were short of water we took it from outside—pumped it in  
262 from outside and condensed it—evaporated it.

Q. Do you know, as a matter of fact, whether there was any tank in which you carried water for steam purposes that was devoted to that purpose, where you carried water there just simply for the boiler? Do you know whether or not they did that on your ship?

A. They used the tanks in the aft hold for boilers, and beneath it. That is, when she was in the fruit trade and in ballast, we used fresh water on the boiler from the aft tank.

Q. Number what is that tank?

A. Well, they call it No. 3. And while they were in the sugar trade between Cuba and New Orleans they used salt water for the boiler, so that they can take more cargo. Partly.

Q. What do you mean by "partly"?

A. Half salt and half fresh.

Q. And the fresh water, then, that you had used as half fresh had come from what tank?

A. From the tank in No. 3 hold.

Q. And that is one of the tanks you call the ballast tanks?

A. Yes.

Q. Now, Captain, that doesn't answer the question I asked you. Was your vessel equipped or fur-

263        nished with any tank that carried water that was used solely and exclusively for boiler purposes?

A. No.

Q. Well, was there any tank on your vessel that was intended to carry principally water for boiler purposes—steaming purposes?

A. Not so far as I know.

Q. Now, this No. 3 tank that you speak of was aft of the engine room?

A. Yes.

Q. That would be in the stern part of the vessel?

A. Yes, the after hold.

Q. And the No. 1 and the No. 2 and the fore-peak tank were forward of the engine room?

A. Yes, sir.

Q. The fore-peak tank in the immediate forward part of the vessel?

A. Yes, sir.

Q. Do you know whether they ever used the fore-peak for the purpose of carrying boiler water in it?

A. No, I couldn't tell you.

Q. Do you know how many tons of water the fore-peak tank could carry?

A. No, I couldn't tell you.

Q. No idea?

A. No, I have no idea. I never took much notice of it excepting when we were taking in water ballast.

264        Q. Well, approximately how many tons of water do you think the fore-peak tank would hold?

A. Well, I can't say now.

Q. Do you think it would hold 50 tons of water?

A. No, not that much.

Q. 40 tons?

A. No.

Q. 30 tons?

A. Well, a fellow can't say except he has been there and been into the tank or seen the blue-print on it.

Q. Well, I am asking you because you were the master of that ship.

A. Well, yes, but still I didn't go down in all the four tanks.

Q. Do you think it would hold 25 tons of water?

A. I don't remember how much there was all together, so it is hard to say anything.

Q. In this report that I have referred to, signed by Heckman, Sorensen and Doswell, the statement is made that the chief engineer and chief officer of your ship at that time, down at Port Limon, stated that the fore-peak tank had a capacity of 23 tons of water. What have you to say to that?

Mr. Flint:

We object to that unless the report is offered in evidence so that counsel can cross-examine the witness upon it. It is not shown that the witness has ever  
265      seen or read the report.

A. Well, I couldn't tell for sure, but it would be approximately that much.

By Mr. Grace:

Q. Well, now, with that statement before you, what do you say?

A. Well, I should think it would be about that much. Somewhere around that.

Q. And do you know of any other tank that water was drawn from for boiler use besides tank No. 3?

A. No.

Q. Tank No. 3 was much lower than the fore-peak tank, was it not?

A. Yes, the fore-peak tank was right up, you know, and then there is No. 1 tank that is in the bottom.

Q. The tanks Nos. 1, 2 and 3 are on the bottom of the ship?

A. Yes.

Q. And the fore-peak tank is above No. 1?

A. Above No. 1.

Q. Do you know whether they ever took any water out of the fore-peak tank for boiler purposes?

A. No, I don't know.

Q. I call your attention to part of article No. 9 in the answer filed in this suit by the Fort Morgan Steamship Company wherein they say: "Respondent says that the fore-peak tank referred to in said article 266 (referring to article 9 of the libel) is and was a small tank built into the ship for the purpose of supplying the boiler." What have you to say to that, Captain?

A. Well, that was before my time. That must have been in. Whether it was put in there for the boiler or not I couldn't tell, because that was left to the engineer entirely, what water he wants to use and where he gets the water from.

Q. If boiler water was carried in the fore-peak tank and used from the fore-peak tank, that would leave your water in No. 3 tank alone, would it not? You would not have to trouble that No. 3 tank?

A. I didn't get that.

Q. In other words, you would not touch the water in No. 3. You would have no occasion to touch the water in No. 3 if your boiler water was carried in the fore-peak tank?

A. Well, I don't remember whether he had water in the fore-peak tank or not. I don't remember, and I can't say anything about it.

Q. No, but supposing that fore-peak tank was in condition to carry water in and he did carry water in it to its capacity, then he could get his boiler water from that fore-peak tank, could he not, just as the answer says here?

A. Yes, they could take water from the outside, too, and use salt water instead of the fresh water.

Q. Now, whether they carried any water in  
267 that fore-peak tank or not on that trip you don't know, you say?

A. No, I don't know. I gave orders to the engineer while we were loading cattle the last afternoon to fill everything that could be filled.

Q. Did you ask the engineer whether or not he had filled up the fore-peak tank?

A. No; I asked him if he had all the water filled up, if we were through with it, and he said yes.

Q. That is, you told him to fill up everything that he could?

A. Yes.

Q. And he told you that he had filled up everything that he could; is that it?

A. Yes, he filled up everything, he told me.

Q. You don't know whether they had any water in the after-peak tank either, do you?

A. No, I couldn't say for sure.

Q. Now, as a matter of fact, wasn't the after-peak tank out of commission because of its bad condition?

A. No, I don't think it was in bad condition, so far as I know. I didn't hear anything about it.

Q. In the report that was made by Heckman, Sorensen and Doswell, that I have been referring to, those

surveyors state that the chief officer and chief engineer advised them that when the "Fort Morgan" sailed from Port Limon the fore-peak tank was empty and the after-peak tank was empty and not in condition. What have you to say to that, Captain?

A. When we were passed by the Lloyd survey they didn't say it was in bad condition.

Q. That is not an answer to the question at all.

(Last question read.)

Q. That is, referring to the trip leaving Port Limon, on November 29, 1917.

A. While I was there before I never remember that we had any water in any of those tanks, because it was not necessary to take any water off them. The fore-peak tank lies right up above the upper deck, you know, up to the between deck, and we never had any occasion to put any water in them tanks.

Q. So, as a matter of fact, then, these two tanks never have had water in them, so far as you know, at any time?

A. I don't know, I couldn't say about it, because I don't remember now.

Q. Captain, did you file a protest?

A. Yes.

Q. Where did you make that?

A. I made it with the captain of the port in Port Limon, and also took it up to New Orleans.

Q. The captain of the port of Port Limon, do you know what his name was or is?

A. No, I can't remember. That was taken up in Port Limon, and the officers, the whole crew, was up before the captain of the port.

Q. Do you remember what his name was?

A. No, I can't remember his name.

Q. Do you know whether it was John E. Romagosa Sanchez, port captain of Port Limon? Do you know whether that is the party?

A. No, I don't remember his name, because we always called him the captain of the port, without mentioning his name.

Q. At all events, it was the captain of the port of Port Limon?

A. Yes, sir.

Q. When your vessel got back to Port Limon what was the degree of list that she had?

A. 45.

Q. Then she was practically at the point of capsizing, wasn't she?

A. Yes; she couldn't stand no more. That is why I turned back. But we still navigated with our own engine into the wharf.

Q. As your vessel got away from the wharf at Port Limon, when you were starting out on this voyage, is it not a fact that on account of the list of the vessel your chief engineer slipped from one of the decks in the engineroom there and hurt himself?

A. Not as I know.

270 Q. You don't know anything about that?

A. No, sir. I don't remember.

Q. And that your second engineer took the watch.

A. Well, I can't quite remember it; no.

Q. You don't recall anything of that sort?

A. I know he slided, but he wasn't in bed; he was on deck all the time just the same.

Q. Oh, I don't mean that he was so seriously hurt that you had to put him to bed.

A. Well, it is more than I know. I never took any notice of it.



Q. Don't you know that he slipped there?

271

A. Well, I remember I heard them talking something about slipping there, but you can slip there if it is level, because it is iron floor, and it is greasy. That wasn't the list.

Q. And did you hear that he slipped on account of the list of the vessel as you were leaving that port?

A. No, I didn't hear that.

Q. But you did hear that he slipped?

A. I heard some talk about it. Leaving the port the master of the ship is too busy looking after everything else to look after small things like that.

Q. Well, I suppose you would consider your chief engineer slipping around the boat to be a small matter?

A. Why, sure.

Q. Now, Captain, you said you called the chief officer and chief engineer on the bridge to consult about going back?

A. Yes, sir.

Q. And they said what?

A. They wanted to go back. I asked them, I says, "What do you think about it? Shall we proceed or shall we go back?" So they say, "For the safety of the ship we had better go back." And Mr. Wilkinson was sitting on the bench where the life preservers was, and I say to Mr. Wilkinson, "Now, what do you think about that? Do you think the cattle can stand it?" He says, "No; the best thing we can do is to go back."

272 So I turned the ship around and went back again and come inside the harbor there at 11 o'clock in the evening.

Q. Then upon this conversation between yourself and the officers and Mr. Wilkinson you determined to turn around and go back?

A. Yes, sir.

Q. Did the crew have anything to say about that?

A. Yes, sir; the man at the wheel, the carpenter.

Q. What was his name—Dittmer?

A. Oh, I have forgotten what his name was.

Q. Well, now, is it not a fact that the entire crew practically went upon that bridge and insisted that you should go back?

A. No, sir. Because I asked Wilkinson first before any of them said anything,—I spoke to him first and I says, "She is running pretty heavy," and then I called the engineers up, and the mate, and then the crew came, and they wanted to go back in, some of them.

Q. Now, Mr. Wilkinson was not one of the officers of your ship?

A. No; he was superintendent of the cargo. The cattle were left in his hands to take care of.

Q. He was not represented to you to be a seaman or a sea-faring man?

A. No, but he had made several voyages across the Atlantic in the cattle trade on the English coast.

Q. He was merely a supercargo on there?

273

A. Yes, sir.

Q. And you say you were asking his advice about whether it would be proper to take your ship back to port or not?

A. I asked his advice on account of the cattle. Not for the ship, but for the cattle.

Q. Well, if the ship was lost the cargo would be lost too, would it not?

A. Why, sure.

Q. Now is it not a fact that the greater part of your crew congregated upon the bridge and told you that they just simply refused to go any further with that ship?

A. Not so far as I remember. They may get scared, some of them, around there, but I was speaking to Wilkinson and the man at the wheel, and I turned the ship around.

Q. Well, you say that there was a number of the crew came up on the bridge, just how many you don't know?

A. Well, they were around there working. On the bridge.

Q. How many men did you have working up on the bridge there?

A. Oh, I don't remember. One or two.

Q. But wasn't there quite a large number of your crew came up on the bridge and told you, "Captain, we want this vessel to go back; we will not go any further with it," or words to that effect?

A. Well, that is more than I can remember. I don't know.

274 Q. You don't remember whether the members of the crew of your vessel, a good many of them, came up on the bridge and refused to go any further with the ship and insisted upon her going back?

A. No. I called up the mate and the engineers, and spoke to Mr. Wilkinson, that is all I know; and two firemen went down into the bunker coal and couldn't straighten her up and they came up. The firemen was down in the hold trying to straighten her up and couldn't make anything out of it because the coal came down on top of them, and they came up and said they couldn't do it.

Q. Is it not a fact that in your statement made to the captain of the port of Limon you stated to him that the crew refused to continue the voyage under the conditions that existed out there?

A. Well, I can't recollect it now. They refused to stay down in the bunkers to clean the coal. I told the chief engineer to send all the men down, as many as he can, and fill the bunker coal and see if he can get her straightened up a little bit, and they couldn't do it. They simply didn't refuse, but they couldn't do it, he said. So far as I remember.

Q. Now, you would not have told the captain of the port at Port Limon that the crew refused to continue the voyage under the conditions that the ship was in unless the crew had actually refused? You would not have made that statement otherwise, would  
275 you?

A. Well, now, whether they refused after they couldn't fire the bunkers, whether they did refuse at the time, I don't remember. They were sore because they had to work and trim the coal, and the coal fell on them, and they were sore and mad, and you know how it is when a man in the position I was in, seeing that thing going on,—I had enough to take care of, and I didn't pay much attention to what they say or what.

Q. Well, coming back to the question, you would not have told the captain of the port of Port Limon that the crew had refused to continue the voyage under the conditions the vessel had gotten in unless the crew had refused, would you?

A. Well, of course, I shouldn't have told him that if it was not the truth. But I can remember it, that I did tell him.

Q. You don't remember whether you told it to him or not?

A. No, sir.

Q. But if you did tell it to him it was the truth, was it not?

A. Well, if I told him that I don't remember. And I don't remember whether they refused right out.

Q. In other words, not remembering it, whether your statement is according to your report or not, you are not prepared to say whether it is true or not; is that it?

A. Well, no, whether they refused to work, 276 whether they couldn't work, or whether they refused to do their work, that is a thing I can't—they come and told me they couldn't do it.

Q. You signed that statement down there before the captain of the port, didn't you?

A. Yes. It was signed by all men on the ship.

Q. Now in the copy I have before me it is set down here by Mr. John E. Romagosa Sanchez, port captain of Port Limon that "The captain told me the crew refused to continue the voyage under those conditions." Now with that statement before you, Captain, what have you to say?

A. Well, if I was refused by everybody of course I couldn't go any further. If you are refused by everybody, and if you couldn't go any further, you have got to stop. They were asked to proceed, but they said no, they couldn't go.

Q. That is, the crew?

A. The crew and officers and all.

Q. Before you finally turned around to go back didn't some of the crew go up there and ask you to turn back, before you had the consultation with your engineers?

A. Well, that is what I don't remember. The firemen came up from the coal and complained they couldn't trim the coal down there because it fell down as fast as they trimmed it.

Q. In other words, it would run from the high to the low side of the ship faster than they could throw it back; is that it?

277 A. Yes. Of course they would pile up the stuff at the side.

Q. Which would keep putting the port or low side down farther and farther?

A. Yes, and the cattle was sliding more and more in the hold, while the coal was coming down on top.

Q. The more coal that slid down to the port side the heavier the list would get?

A. The more list she would get.

Q. Captain, is it not a fact that you stated to the captain of the port of Port Limon that when your vessel left Port Limon she had a list of 7 degrees to port?

A. Yes, sir.

Q. She had that at the wharf before you let your lines go?

A. Yes, just when she left.

Q. Now, when you left the wharf who was serving as pilot on board?

A. One of the captains, Sorrensen, I guess his name was. The man that signed that—you mentioned his name a little while ago. Mr. Heckman. And the other captain's name—

Q. That is Ingre Sorrensen?

A. Yes, sir.

Q. And he left your vessel where?

A. In the middle of the bay.

Q. And that was about how far from the  
278 bar?

A. Well, there is really no bar, you know. There is no bar. It is only shallow water outside. He left it about just in the middle from the key to the wharf.

Q. And that would be about how far?

A. Oh, about a mile. About a good mile.

Q. It would be out a mile from the wharf and about a mile to the key?

A. About two miles to the key.

Q. About two miles, then, to the key?

A. Yes.

Q. That would be about one-third of the way to the key?

A. One-third of the way to the key.

Q. From your position on your ship at the dock you could see the sea on the outside, could you not?

A. No, you couldn't notice it, it was just dusk. You couldn't see anything out there from the ship.

Q. Do you remember about what time it was that you left the dock?

A. It was somewhere around—it must have been about six o'clock.

Q. You could see the sea on down to as long as the twilight or daylight—

A. Yes; I was looking down on the beach and on the key, but I couldn't notice anything—anything serious.

Q. In fact the ground-swell you spoke of is nothing serious?

279 A. Oh, them heavy waves, if they strike the ship right in the side, can throw the ship over a good deal.

Q. But if your ship was on an even keel, with a good measure of stability, it wouldn't have any effect on it?

A. It would go the same way, because as soon as she listed over the cattle slide, and they were tied up and couldn't get back. The ship has left many times with a bigger list than that and we straightened her up easy.

Q. Now you speak of these cattle being tied with ropes. Is it not a fact that those ropes were not more than two feet long?

A. They were two or three feet long.

Q. You said three feet in your direct examination, and I am asking you if it is not a fact that the ropes were not more than two feet long?

A. Well, I never measured them, but what I saw when I was down there looking at them, they must have been about between two and three feet. The exact measure I can't say. He brought up a rope, and I asked him what he was going to do with all that rope, and he said he was going to tie the cattle with it.

Q. And he tied the cattle with it?

A. Yes, sir.

Q. What was the condition of the weather, Captain?

A. Well, it was clear. Well, I don't remember now.

Q. Was it not clear, fair weather?

280 A. I think it was cloudy weather.

Q. Is it not a fact that there was little or no wind at all there?

A. Well, I couldn't tell you how the wind was; but I think it blew pretty hard in the afternoon. In fact I can't say anything about it, because I don't remember.

Q. You don't remember distinctly whether it blew or not?

A. No. How it blew.

Q. If, as a matter of fact, the wind had blown in and during the afternoon to any material extent you would know there would be a ground-swell outside, would you not?

A. Sure. But if it blew a little, or if it blows heavy far off from shore, we don't get heavy swells on the land.

Q. Your log book would show what sort of weather it was, would it not?



A. Yes, it would show everything.

Q. It would show what the reading of your barometer was and all?

A. Yes.

Q. And you haven't got that log book?

A. No, sir.

Q. Did the owners of your vessel give you any instructions not to carry any particular kind of cargo?

A. Not as I remember.

Q. You were to carry whatever cargo offered?

281 A. I never heard anything about it. There was never any kind of question about what kind of cargo to take or not to take. She was chartered to the Central American cattle combine to load the ship.

Q. How long previous to this trip you started on from Port Limon in the latter part of November, 1917, was it that you carried the five hundred and some odd head of cattle? How long previous to that?

A. It must have been, I guess, about four months previous.

Q. Who was that trip made for?

A. It was made for Mr. Battencourt. He had an office there in New Orleans.

Q. Did your owners know that you had carried that cargo?

A. Yes, sir.

Q. They made no complaint about it?

A. No, sir.

Q. And you had more cattle on that trip than you had when the Armour & Company cattle were aboard?

A. Yes, sir; I had over a hundred more.

Q. Did you carry any deck cargo of lumber?

A. Yes, sir.

Q. From Galveston?

A. From Galveston to Guantanamo in Cuba. That is a United States naval base.

Q. Did you carry deck cargo over there, or lumber?

A. Yes, sir.

Q. How did the ship act under that?

282

A. She had a list to port side heavier, about 9 degrees, but she acted good. We had the tail of a hurricane between Cuba and Jamaica, with a deck load, and a heavy list on it.

Q. And you went with that to Guantanamo?

A. Yes.

Q. Went on into port and unloaded?

A. Yes, sir.

Q. Is it not a fact that when you got to the port of Guantanamo the captain of the port came out to see whether you needed assistance on account of the heavy list of your ship?

A. No, sir. He couldn't come out. We had to go through the nets. Nobody could come out.

Q. Did any officer from Guantanamo go out to your ship to ask if you needed assistance?

A. No, sir.

Q. Is it not a fact that someone went out from Guantanamo to find out whether you needed help or not on account of the list of that vessel, and that you advised them that the trouble you were in was caused by not putting your heavy stuff down below? That is on the first lumber trip out of Galveston.

A. Well, the captain of the port—It was the supercargo that I was speaking to, and he said we didn't put enough cargo in; that if we had put heavy stuff in the bottom we could have loaded more deckload.

283 Q. Wasn't there a person that came out in the port of Guantanamo in a steam or gasoline power launch to you to find out about your condition, and that you reported that you wanted to make that port, and that your trouble was caused by not putting the heavy stuff below?

A. No, sir, not a fellow that came out, I wasn't talking to, as I know of,—as I remember it anyway; but there was no trouble with the ship whatsoever. She acted fine. And I took her in through the nets they had out there. There was, of course, submarines in the harbor, and I was waiting outside two hours for them to open the nets, and then I proceeded right in to the wharf and started to discharge next morning.

Q. Well, do I understand that you don't remember or that no one actually came out?

A. Well, the pilot came out. Well, I don't know—there was two boats came out. The custom officer comes out first, and then the people from shore—the pilot from shore. But there was nothing in the way like having any accident. She was in good condition.

Q. I am not asking you whether you admit there was any accident; I am asking you whether an officer of the port there, a customs officer, as you term him, or a port officer of any kind—

A. Not as I remember.

284 Q. One moment. (Continuing question)—came out there in a launch and asked you about the condition of your vessel, or came out there to see if you needed assistance, and that you advised him that the list was due to the fact that you didn't put the heavy stuff down in the hold?

A. Well, it may have been, but I don't believe so, because I didn't take no notice of it.

Q. Did you make a second lumber trip then from Galveston?

A. Yes, sir.

Q. And on that second trip she showed a list again?

A. Yes, sir.

Q. And on that second trip you put the heavy stuff in the hold, did you?

A. Yes, we put the biggest stuff in the hold, and we put more deck load on her.

Q. Now, you spoke of one of the representatives of Armour & Company taking part in the putting up of cattle fittings.

A. Yes, sir.

Q. Do you know at that time whether he was doing that work for Armour & Company or whether he was in the pay of the Central American Cattle Company?

A. Yes, sir; he was sent down from Washington from Armour & Company—he was working in Armour's store in Washington, he told me, and was sent down to New Orleans to take care of the cattle, and he was representing the Central Cattle Company's office, but sent from Washington for Armour.

285 Q. Sent from Washington for Armour?

A. Yes, sir.

Q. There is no dispute about the fact that he was sent there with respect to certain duties in looking after the cattle themselves for Armour & Company; but what I have asked you is this: When he was putting or helping to put cattle fittings up, do you know whether or not, for that work, that is, the doing of carpenter work there, he was in the pay of the American Cattle Company in doing that?

A. No.

Q. You don't know?

A. I don't think so.

Q. If Armour & Company's representative has stated that he was in the pay of the American Cattle Company insofar as that carpenter work is concerned, you are not prepared to contradict that?

A. I don't know anything about it.

Q. The party I refer to is Mr. Wilkinson. That is the man, is it not?

A. Yes, sir.

Q. Now, about how many more cattle did you have on deck on the first cattle trip you made than you had when you were carrying this Armour cattle?

A. That I couldn't tell.

Q. Just about, Captain.

A. Oh, I must have had about fifteen more.

Q. The same kind of cattle?

286 A. No; they were not quite as fat.

Q. Now, when these cattle pens were being constructed you looked after whatever was necessary to be looked after with respect to them that related to the safety of the ship, didn't you?

A. Yes, sir, I was looking after everything especially the things that was needed most for the ship for the ship listing over,—I was looking after everything on the ship like the shifting-boards and things that would make the ship secure, and then while they were putting the pens up I left that to Wilkinson to do the best way for the cattle.

Q. Did you tell him about how many cattle you wanted to the pen?

A. No. Of course I couldn't do that. That was up to him. That was his business. So long as I saw that the ship was safe.

Q. In other words, anything they would do that you thought was not safe or proper you would not let them do it, would you?

A. No, sir.

Q. So whatever they did, when it was finally finished up, that met with your approval?

A. Yes, sir.

Q. Therefore you approved of the way these cattle pens were built and you approved of the way  
287 the cattle were loaded on board?

A. Yes, sir.

Q. Any changes that you wanted made, and anything that you wanted done, no matter what it was, they were always ready and willing to do it as you wanted it?

A. Yes, sir. \*

Q. Now, Captain, you spoke about shifting-boards, so as to afford some measure of protection there for the safety of the ship? How did they act?

A. They go in the middle of the ship. They divide the ship in two so that the cattle on one side can't fall over to the other side.

Q. Then the shifting-boards were put in for the purpose of preventing the cattle from shifting?

A. Yes, sir.

Q. The same way where a ship is carrying cargo in grain, for instance?

A. The same thing.

Q. You put shifting-boards in there to keep the grain from shifting?

A. The same thing.

Q. And if you had had shifting-boards in your coal bunkers your coal would not have shifted over so far?

A. Which never was done. It never was used.

Q. But you are dealing with a vessel that has a list, you say, that is given to having a list, and the question

288 is, if you had shifting-boards in your coal bunker your coal could not have shifted over, could it?

A. Oh, yes, but—

Q. You say, "Yes"?

A. No. I said no, it wouldn't shift over. There couldn't be no shifting-boards there, because they would be in the way to get the coal down to the lower bunkers, to the fire room.

Q. And not having shifting-boards in your coal bunker when your vessel is listed to port your fireman reported that the coal was running from the starboard side over to the port side faster than they could throw it back?

A. That was as long as they got the heavy list.

Q. And it was running over to port side faster than they could throw it back?

A. Well, it came out from the side and ran down.

Q. And that coal came from the starboard side and ran on down over to the port side faster than these men could throw it back?

A. Sure.

Q. In fact, they told you they couldn't stay there at all, that the coal was running down in on top of them?

A. No, they couldn't work down there.

Q. On account of the coal running down on top of them?

A. Yes. They couldn't work—wouldn't work.

Q. That is, the coal was running from the starboard side clear on over to the port side?

A. Yes.

289 Q. The list that you speak of that the "Fort Morgan" had on these many occasions that you have been referring to, that was a list always to port?

A. So far as I remember, it was always to port.

Q. Do you remember her listing over to starboard at any time?

A. No, I can't remember.

Q. And the trouble that you had on this occasion when you left Port Limon with the Armour & Company cattle, that was a list to port?

A. A list to port.

Q. Now, if water was taken out of the port tanks that ought to correct the list to a certain extent, ought it not?

A. Well, that is what we always do to straighten it up, take water from them tanks.

Q. Captain, going back to that report signed by Heckman, Sorrensen and Doswell, they state that they "learn from the chief officer and chief engineer that this tank (referring to No. 1 tank) had never been filled to its capacity since they had been in the ship, the chief officer and chief engineer stating that they understood it leaked when so filled." What have you to say about that?

A. Well, I can't say anything else only it was overhauled by the Lloyd survey and they found it in good condition. The chief engineer and the chief officer were new men on board, and they didn't know anything about the tanks.

Q. I understood you to say sometime back in your examination that of your own personal knowledge you don't know what the Lloyd surveyors found when they examined your tanks.

A. They found them in good shape, else they wouldn't have let the ship go.

Q. But of your own personal knowledge you don't know what they found?



A. No, sir, I couldn't say exactly how good they were, but I got a certificate on the boilers handed to me by the Lloyds.

Q. Now, this report I speak of here is signed by Mr. Doswell under appointment as Lloyd's agent in Costa Rica. But coming back to the question, if the chief engineer and the chief officer made that statement to these men, are you prepared to deny that that is the fact, that that tank did leak if filled to its full capacity?

A. I don't know if it was leaking. I never seen it leaking, and I don't know if it was leaky, and I only went by the Lloyd survey that it was passed in good condition.

Q. It was no part of your business to go down and examine that tank?

A. No, sir. I never was in the tank.

Q. And you never made an inspection of it to ascertain whether it was leaky or not?

A. No, sir, because there was no necessity.

Q. Now, Captain, do you know what amount  
291 of ballast was necessary to put in that ship to carry the cargo that she had with the vessel carrying it in the usual and ordinary way that vessels carry their decks level,—do you know what amount of ballast would be required, in tons?

A. No, I can't say.

Q. Have you any idea?

A. No, sir. If the ship had been straight when loaded there would have been no danger.

Q. Captain, for each ton of freight carried on the upper deck do you know how many tons of ballast is required down in the hold to give her proper stability? I am speaking of the steamship "Fort Morgan."

A. If she carried how much?

Q. For each ton of freight carried on your upper deck do you know what weight of ballast would be required to be carried in the hull of the steamship "Fort Morgan" to give her proper stability?

A. That is a hard question to answer.

By Mr. Flint:

Q. The question is, do you know?

A. No, sir, I don't know.

By Mr. Grace:

Q. Have you any idea?

A. No, sir. It depends on the cargoes you have in the hold.

Q. How is that?

A. It all depends on how she is loaded in the hold.

Q. Well, suppose we put it this way; for  
292 each ton of weight of cargo loaded on the upper deck what weight will you have to carry in the lower hold, in the bottom, to give her proper stability?

A. That is a hard question to answer.

Q. Do you know?

A. No, I don't know. It is only according to the cargo in the hold, and the kind of cargo.

Q. When your vessel, for instance, is light, that is to say, without any cargo at all, what amount of water ballast do you carry?

A. Well, I can't remember. Maybe somewhere around 100 or 200 or 250 tons. I can't remember.

Q. You can't come nearer than two-fifths of the total of your amount of ballast when your ship is light?

A. Two-fifths?

Q. In other words, you are allowing yourself a margin of 40 percent there, Captain. Can't you come nearer

to that in a statement of how much ballast it would need when your ship is running light?

A. Well, what she needs depends on the weather. She would need no ballast at all if it is nice weather, and if it is heavy weather we put more ballast in. All according to the weather. The ship will stay up empty, without ballast.

Q. And would have a list of how many degrees then?

A. Well, that is something I didn't take much notice of.

Q. She would have a list, though, wouldn't she?  
293

A. She generally had a list to port.

Q. When you left Port Limon for New Orleans you went without cargo?

A. Yes, sir; ballast.

Q. How much ballast did you carry?

A. Oh, not much. I guess two tanks full.

Q. Do you know?

A. No, sir, I don't know exactly.

Q. Have you any idea?

A. No, sir.

Q. Well, now, taking that vessel light, that is, in ballast, as she was when she left Port Limon for New Orleans, for each ton that you would place on the main deck how much ballast would you have to carry for that?

A. Well, I couldn't possibly say.

Q. You have no idea?

A. No; because the after deck is away low and the forward deck is away up. If the weight was put in the forward deck she would want about 50 percent more than if it was put on the after deck.

Q. Well, suppose we put it on the forward deck. For every ton of weight that you would put on the forward deck how much ballast would you have to carry to meet that?

A. Oh, about 20 or 30 tons.

Q. Well, now, is that just a guess, or do you know?

A. A guess. Of course, I can't know.

294 Q. Do you know what the rule is for determining just how much ballast you have got to carry below for the weight above?

A. No; I never heard that rule, and I never seen the rule. It is in the judgment of the master of the ship how much she can stand.

Q. Then you could tell that only by getting the cargo on board?

A. Yes, sir.

Q. You couldn't tell in advance just how much cargo you could carry, then?

A. Not exactly.

Q. And you might miss it by a big margin?

A. Yes, sir.

Q. Do you understand what is meant by the term "center of buoyancy"?

A. No, sir.

Q. Or longitudinal buoyancy—do you know what is meant by that?

A. No, sir. I know what longitude is, but—

Q. Now, in this term "longitudinal buoyancy," I am not having reference to longitude with reference to navigation but with reference to the length of your vessel. Do you know what "longitudinal buoyancy" means with respect to the length of your vessel?

A. No, sir.

295 Q. Do you know what "vertical buoyancy" means with respect to a ship?

A. No.

Q. Do you know how to ascertain the center of gravity of your cargo or of the cargo and vessel?

A. I don't understand them words.

Q. You know what the center of gravity means, don't you?

A. No, sir.

Q. And you are the master of the ship?

A. Yes, sir.

Q. And don't know what the center of gravity means. Do you know what gravity means?

A. Yes. Gravity, that is something like danger.

Q. What do you mean when you say that it is something like danger?

A. Well, danger of the ship.

Q. Well, there are a good many dangers that a ship is exposed to. What has gravity to do with danger to a ship?

A. Well, I don't know the word. I haven't heard it before.

Q. Have you heard of the laws of gravity?

A. No, sir.

Q. Do you know anything about determining the metra-center of a ship? Take the "Fort Morgan" or any other ship.

A. No; I don't know. I don't understand them words.

296 Q. Do you know what is meant by the wedge of buoyancy of a vessel?

A. No, sir.

Q. You know what buoyancy means, don't you?

A. No, sir.

Q. Are you an American citizen, Captain?

A. No, sir. But I have got the intention paper the second time now.

Q. Do you know how to ascertain the displacement of your vessel, that is to say, at what particular mark she will float with a certain amount of cargo or weight aboard?

A. Yes, sir; we have a plinsol line on the side and we can pretty near tell by that how much.

Q. I am not referring to the plinsol mark. That is merely intended to show how deep you can load your vessel.

A. Yes, sir.

Q. But what I mean is this: Do you know how to determine at what point she will float with something less than a full cargo?

A. She always floated less with less cargo. The plinsol mark will show—

Q. In other words, the plinsol mark would show you how deep you could load her with a full load?

A. Yes, sir, in fresh and salt water.

Q. In other words, depending upon the density of the water?

297 A. Yes, sir.

Q. Do you know what the difference is between the Atlantic water and the water of the Indian Ocean, say on the "Fort Morgan," as to how light or how deep she would float in one or the other?

A. Well, it never says anything of it in the regulation.

Q. Don't your plinsol mark show that?

A. Yes, and it also shows how much in fresh water and salt water, and it doesn't say anything about the water in the West Indian Ocean or up north. But she will be lighter closer to the Equator, where the water is saltier, than up north where the water is more fresh.

Q. Now, Captain, you were the one that raised this question about the plinsol mark. Do I understand you to say that there is nothing about the plinsol mark to show you the load water-line when the vessel is to be loaded for the West Indies or for the Indian Ocean?

A. Yes, it does; but we never—

Q. Do you know what that difference is?

A. It is very slight.

Q. Well, do you know what it is?

A. Yes, I guess it is a quarter of an inch difference, or half an inch.

Q. On what vessel? Would the size of your vessel make any difference?

A. No, sir.

298 Q. Whether it be a big or small vessel, it would be just a quarter of an inch difference; is that it?

A. Yes, sir. The same thing on each one of them.

Q. Do you know what the difference in displacement of the "Fort Morgan" would be floating in salt water and floating in fresh water?

A. Yes; I guess it will be about 40 tons.

Q. Can you give me the difference in inches between the flotation mark where the "Fort Morgan" would float in salt water as compared with floating under the same conditions in fresh water?

A. Yes. Three inches and a half.

Q. Don't you know it is a fact that in the case of ocean-going steamers the difference is nearly six inches between the fresh water flotation mark and the salt water flotation mark?

A. Yes, I guess so. But we never practice it. We go by the mark that is put on the ship by the board of trade.

Q. Captain, I would like to get from you if I can, definitely, just when you commenced operations, no matter what they were, for the purpose of taking the list out of the "Fort Morgan" on that trip in the latter part of November, 1917, leaving Port Limon?

A. The first thing that was done when she got to listing when the cargo was pretty near in, I told the chief engineer to straighten her up as soon as he could and to let the firemen take the bunker coal from the port side.

Q. Now, that answer merely states what the orders were that you gave; but what I want to ascertain, if you know, is when did the operation first commence, no matter what the operation was, to straighten that vessel out, of your own personal knowledge. Not when you gave orders, but when the operation was actually commenced.

A. Yes, sir. I seen them pumping the water right away.

Q. While the vessel was lying in dock?

A. Yes, sir.

Q. The first day you were loading?

A. Just before we left. Just before we shipped.

Q. Then that was the second day?

A. That was the second day. Yes, the second day.

Q. You mean the day on which she left, then?

A. Yes, the day on which she left. The fresh water hose was laying on deck full of fresh water from shore.

Q. And that vessel was lying what side to the dock?

A. Port side.

Q. And the water was going into what side?

A. To starboard side, because that was empty. It was going into where it was empty in the tanks. Because I was very anxious to get plenty of water for the cattle.



Q. Well, now, were you having that water pumped into the vessel or run into the vessel for the purpose of affording the cattle water, or were you doing that to get the list out of the vessel?

300 A. Well, they trim up the bunker coal. She had used so much coal from—

Q. But I asked you whether the water was being run into the vessel for the purpose of giving that water to the cattle or whether you were doing it for the purpose of taking the list out of the vessel.

A. To take the list out of her and to give her more stability in the bottom.

Q. But I understood you to say that you had given the engineer instructions to pump up all the tanks as far as he could.

A. That is what I gave him, yes.

Q. Well, that would mean to pump up the port tank too, would it not?

A. Yes, to fill them all up.

Q. So that if you wanted to take the list out on the port side, with all of the tanks filled, you would be wanting to pump water overboard from the tank to the port side, would you not?

A. No; when the tanks was full you couldn't get any more in them then.

Q. Yes, but after you got your tanks filled she still had the list to port?

A. Yes, she had the list in the cargo, the cattle. It would have to come from the cattle; it couldn't  
301 come from anything else.

Q. And to try to take that list out what did you do?

A. Well, everything was filled up, and whatever we fired we fired from the port side.

Q. Then your idea was to fill up all the tanks below so as to get the weight of that water down in the lower hold; just that much more ballast, in other words, against the weight of the cargo above?

A. Yes; and for that reason we had to have plenty of fresh water in case of accident on the trip going up.

Q. So that you ordered all the tanks to be filled that could be filled?

A. Yes.

Q. That was it, was it?

A. Yes, sir.

Q. And they had filled up the port tank and were filling up the starboard tank—or filled it up?

A. Yes.

Q. Then I understand that, that not having taken the list out, you were shifting your bunker coals then?

A. Yes, sir.

Q. From port to starboard side?

A. Yes.

Mr. Flint:

I don't think he said "shifted." He said they were using coal from the port side.

302 By Mr. Grace:

Q. "Using" or "shifting"?

A. Using and shifting.

Q. In other words, you were taking a certain measure of weight away from the port side by moving the coal away from the port side to the starboard and using the coal from the port side; is that it?

A. Yes, sir.

Q. And still after doing all of that she had a list to port anyhow?

A. That came from the cattle—the cargo.

Q. Now, if you had put more ballast down in the hold of the vessel you could have corrected that, could you not?

A. That is hard to say. The cattle is movable. If they move over to one side, they will go over anyway, to one side or the other.

Q. But if you have the cattle all secured by short lines there, running, as I understand the testimony, from two to three feet, some of the witnesses saying two feet and you saying from two to three feet, and you have shifting-boards there, according to your testimony, to keep the cattle in a safe condition so far as the stability of the ship is concerned,—

A. Yes, sir.

Q. Now, what I want to get at is this: Don't you know, as a matter of fact, that if you would put more weight down in the bottom of your vessel you are bound to give her more ballast and more stability?

A. Yes, sir, I know that. But cattle, while  
303 they are loaded, they come down there on the deck, where it is wet and full of slop, and they stay there and fall down, and with a little listing they will slide down, and when they get crossways they can't get up.

Q. But they can only slide as far as the length of the rope would let them slide?

A. No, they could slide from one side to the middle.

Q. Provided the rope broke?

A. Well, some was tied in to midships, and the whole length of the cattle would fall down that much; and some ropes were broke, too, when they took the dead cattle ashore.

Q. Did you see a single rope on any of those cattle there that was broken?

A. Yes, sir.

Q. Where?

A. In the hold.

Q. In what part of the hold?

A. In the main hold; in the main hatch.

Q. Did you see a single rope broken?

A. Yes, I seen two pieces of rope broke there.

Q. Do you mean it was on one or two cattle where the rope had broken?

A. It was on each cattle.

Q. That would mean two cattle?

A. No; of course I don't remember so far back, but I saw a couple of ropes laying there from the  
304 cattle.

Q. Now what I want to get at is, did you see a single one of that cattle in the cargo where the rope had parted?

A. Yes, sir; I saw a couple of them.

Q. You saw two or a couple?

A. Yes.

Q. And you say they were down in the main hold?

A. Yes.

Q. How far down?

A. Well, I think it was the lower hold. The lower hold sir.

Q. Well, now, which one, Captain?

A. In the No. 2 hatch.

Q. And where at—down in the lower hold?

A. Down in the lower hold, yes.

Q. And that was below your shelter—or main deck bunkers?

A. Yes, sir.

Q. And it was just these two that you saw on which the rope was broke?

A. That is as much as I noticed.

Q. And you remember that, you say?

A. Yes, sir, I remember that.

Q. And do you suppose the breaking of a rope on two cattle out of a cargo of 420 will cause your cargo to list?

A. I didn't notice any more. There may have been more, but I didn't notice any more.

Q. And the two cattle were where? You say  
305 the rope had broken.

A. In the lower hold I seen them.

Q. And they had shifted from what side to where—or had the cattle shifted at all; had they just fallen right down there in that pen?

A. Where they came from I couldn't say, but they were laying down there.

Q. In the pen?

A. Yes.

Q. On what side?

A. Close to the hatch; close to the pen in No. 2 hatch.

Q. Right in the open hatch?

A. Yes, close to it.

Q. Well, close to the open of the hatch?

A. Yes.

Q. To which side?

A. Well, I don't know, but I think it was on the port side.

Q. They were on the port side?

A. Yes.

Q. Close to the open of the hatch?

A. Yes, sir.

Q. And you state under oath that you saw two with the rope broken?

A. Yes, sir, I saw two. I noticed.

Q. Did you see any more than two?

A. I can't remember.

306 Q. And when you were on the bridge of that ship how many cattle were right under your view there on that deck, from the bridge?

A. Or, there was—well, I had the whole thing down below, you see, on the pens—on the hatch. I saw the whole cattle on No. 2 hatch, and part of the hatch was penned off.

Q. Standing on the bridge of your ship, how many of that cargo of cattle could you see on the deck?

A. Well, I saw—I can't say exactly how many I saw. I saw a couple of cattle come falling down from the upper deck too.

Q. You are not answering my question, Captain; you are volunteering a lot of things, and I am going to call the Court's attention to that. Now I have asked you two or three times, and I will ask you again; standing on the bridge of your ship how many cattle did you see on the deck?

A. I saw all the cattle on the deck and all the cattle—

Q. Well, how many were there?

A. I don't remember how many there was.

Q. About how many?

A. I think about 40.

Q. 40 on the upper deck?

A. Well, in fact I don't remember how many there was.

Q. The bill of lading shows you had 420 all together?

- A. Yes.

Q. Now, how many were on the upper deck?

307 A. I don't remember how many there was. I don't remember.

Q. You have no idea at all?

A. No, sir.

Q. You said something about 40.

A. I think there was about 40 on deck.

Q. And then the other 380 would be where?

A. They would be divided up equally in the three decks forward.

Q. And those three decks forward, how many of those decks would be under your bunker hatch that was on this shelter—or main deck?

A. One.

Q. There would be one whole deck under there?

A. Yes, sir; the fruit deck.

Q. And how many cattle were down on that fruit deck?

A. They were equalized on all decks, because they were even.

Q. About 125, then, say. You had 380 all together. There would be about 125 or 126 or 127, or something like that.

A. Well, about 120, I should think, on each deck.

Q. And that 120 would be under the coal bunkers?

A. Yes, sir.

Q. And on this main or shelter-deck?

A. Yes. And so on the bottom deck too.

Q. And how many on the bottom deck below that fruit deck?

A. Same thing.

Q. About 120 odd. So that there would be about between 240 and 250 on the two decks below the coal bunkers that was on this main deck you speak of?

A. Yes, sir.

Q. And that would leave, then, about 120 odd on the main deck?

A. No; that would leave the rest for the after hold.

Q. And in the after hold would they be below your coal bunkers?

A. Yes, sir. The lower hold will be below; and the next deck will be below, halfways.

Q. That would be a fruit deck?

A. The after hold has only one deck, and the cattle on the fruit deck, in the after deck, will be about two-thirds below the coal-bunker deck.

Q. Two-thirds of what below?

A. Two-thirds of the height of the cattle.

Q. What do you mean by that, Captain?

A. The after deck has no between-deck; it is an open hold; and the fruit deck is built a little above the tunnel.

Q. That is, the tunnel carrying the propeller shaft?

A. Yes, sir. And the fruit deck there—well, about three and a half feet from the fruit deck is up to the bunker deck, in the bunkers.

Q. So that the cattle aft will be standing on  
309 this fruit deck, which is on a level three and  
a half feet below the deck where your coal  
bunker was on?

A. Yes, sir.

Q. Then all of the cattle excepting about 40 head were standing on decks below the bunker that was on the shelter—or main deck?

A. The cattle in between deck was on the same deck as the bunker coal.

Q. You see, Captain, if we had a plan of the loading here we could tell at a glance just where this cattle was all stored, and not having that I want to try to get at it as nearly as I can.

A. Yes, I understand.



Q. Now, I understand there was about 40 head of cattle carried up on the upper deck?

A. Yes, sir.

Q. And all the rest of them were carried down in the hold of the vessel—

A. Except 20 was carried—about 15 or 20—in the after deck. But the after deck is below the main deck. If I had a piece of paper I would easily—

Q. Well, that would make it all right anyhow, would it not?

A. Sure.

Q. Every deck they were standing on, then, was below your main deck?

A. Yes, sir, except forward.

310 Q. Excepting about 40 that were on the upper deck?

A. Yes, sir.

Q. So that would make 380 head of cattle that were stored on different decks, or in different places, but every deck they stood on was below your main deck?

A. Not every. The forward between-deck runs flush with the bunker deck.

Q. Well, how many were on that?

A. 120; the same as on the other decks. Well, there were 360 cattle in three decks forward, and 40—

Q. Well, let's see if we can get this straightened out again. You had 40 up on the upper deck?

A. Yes.

Q. Now, the deck below your upper deck you call your main deck; is that it?

A. Yes.

Q. And you had these bunkers that we speak of, that were carrying two-thirds of your coal fuel, built on your main deck; is that right?

A. Between-deck.

Q. I understood a while ago you called it the main deck. In the report it was referred to as the shelter-deck. Now you are referring to it as between-deck.

A. We call it between-deck. If you have a piece of paper it is easy to make a little plan so that  
311 we can understand it better.

Q. I hand you a sheet of paper and ask you to draw a sketch giving us a side view of the ship, something like a loading plan, and show us where these cattle were stowed, and where those coal bunkers are that the report says that you had about two-thirds of the coal in (handing sheet of paper to witness); and you might do that between now and tomorrow morning.

(An adjournment was thereupon taken until Thursday, September 18, 1919, at 11 o'clock a. m.)

312 Los Angeles, Cal., Thursday, September 19, 1919; 11 A. M.

Parties met pursuant to adjournment; present as previously noted.

THOMAS JOHANNASEN, re-called for further cross-examination, testified as follows:

(Cross-Examination (Resumed)).

By Mr. Grace:

Q. Captain, you have made a sketch here of a plain of the ship, with the idea of giving, in a general way, as I understand, the decks and the location of the cattle on the particular decks. I will ask you to write your

name on the sketch itself, Captain, with pen and ink (offering pen to witness).

A. Well, can I do that when I am not sure of things?

Q. How?

A. I am not sure of those things, you know. That is just taken out of my head.

Q. Well, if you will just simply write your name on that for the purpose of identifying the sketch; and I understand from you that that is the best of your recollection of the locations of the things.

Mr. Flint:

Now we want to object to the offering of this sketch for the reason that the witness has testified that he cannot recollect how the vessel was constructed,  
313 and that the sketch which he prepared may not agree with the vessel.

By Mr. Grace,

Q. Now, Captain, for the purpose of identifying the diagram definitely just kindly put your name on the end of it, or on the bottom of it.

A. No; if they bring the real blue-print of the ship that may be away off.

Q. Well, Captain, you will remember that yesterday evening I requested you to make the plan of the ship after you had asked for a piece of paper to draw the sketch yourself.

A. Yes, sir.

Q. You started to make the plan, and then I suggested that you might wait until this morning, and that in the meantime, at your own leisure, at your own quarters, you could draw up that sketch, when there would be nobody around to interfere with your drawing or to

embarrass you in any way. Now at this morning's sitting you produce this sketch, and when I ask you to sign it you seem to hesitate about signing it for fear you have got something there that will be away off when the blue-print is produced.

Mr. Flint,

I object to that on the ground that it is incompetent, irrelevant and immaterial and not admissible, a mere argument and not a question propounded to the witness.

By Mr. Grace,

Q. When was it you made this sketch, Captain?

A. This morning, in the drug store, coming down.

Q. That was after I stated to you yesterday that you might take all the time you wanted from the  
314 time we adjourned yesterday until this morning?

A. Yes, but I am working, and I had to go to attend to my business.

Q. You made that when none of us were around, and made it at your own time?

A. Yes, sir. But I didn't promise to sign it. Because that can't be exactly as the log book says.

Mr. Grace:

The sketch produced by the witness is offered by the Libellant in connection with his cross-examination and as a part thereof, and for the purposes of identification is marked "Armour & Company Exhibit B-4."

Mr. Flint:

I object to that as incompetent, irrelevant and immaterial; and on the further ground that the witness has

testified that he is compelled to work nights and has not had sufficient time in which to prepare the sketch.

By Mr. Flint:

Q. Did you testify that you had to work nights?

A. Yes; I said so yesterday.

315 By Mr. Grace:

Q. Captain, is this diagram as nearly correct as you are able to make it at this time?

A. Yes, sir.

Q. Is there anything in or about this diagram that you want to change in any way?

A. I can't remember anything to change there.

Q. Speaking of the "diagram," of course I have reference to this plan you have drawn marked "Armour & Company Exhibit B-4." That is the one you understand I was speaking about?

A. Yes, sir.

Q. What was the weight of that cattle, Captain, that 420 head?

A. I couldn't say.

Q. What is your opinion as to the weight of the cattle?

A. I have got no opinion about it.

Q. Have you any idea at all?

A. No.

Q. Now, up on the very top, alongside of this little projection marked, respectively, "1" and "2", you have got "25 C." Does that mean 25 cattle?

A. Well, I am not sure of it.

Q. Well, I say, this mark you have put here, "25 C," does that mean 25 cattle?

A. Yes, sir.

Q. You are not sure of the number there, are you?

A. No, sir.

Q. It may have been less?

316 A. I can't tell. More or less.

Q. But the best of your recollection is that there was 25 upon that deck which you have marked "Main deck"?

A. Well, I don't know. I just put that to fill the numbers out. I can't remember how many there was.

Q. That is the deck you call the main deck?

A. The main deck.

Q. Then just below that you call that deck the between-deck?

A. Yes, sir.

Q. And on that one you have 90 cattle. Is that the best of your recollection?

A. I just put those numbers down to fill out the number of cattle. I can't remember the number on it.

Q. Then below that deck designated as the between deck you have another deck here marked "Fruit deck"?

A. Yes, sir.

Q. On that you have got 100 cattle. That is the best of your recollection, is it?

A. Well, I say, I couldn't tell.

Q. Then on the deck below the fruit deck you have marked "Bottom, 95 cattle."

A. Well, I can't say anything about them cattle, how many there was. I only put in those numbers to fill the tally out.

Q. Well, I see on the plan itself you have marked up 95 cattle.

317 A. Yes; I just put that on there to fill the numbers out.

Q. Now, those four decks I have mentioned were and are forward of the boiler and engine room?

A. Yes, sir.

Q. Now taking the decks aft of the boiler and engine room, you have the after main deck, indicating hatch 3, with 10 cattle on. You have marked that on the plan.

A. Yes. It is marked there just to fill the tally out.

Q. Then below that after main deck you have a deck designated as "Fruit deck" with 60 cattle on.

A. The same thing.

Q. And then below that fruit deck, and on a line with the forward bottom or deck, you have 40 cattle?

A. The same thing.

Q. Now in this plan you have got the "One ballast." That would mean the No. 1 ballast tank you are talking about?

A. Yes.

Q. How many gallons of water did that tank hold?

A. I don't know.

Q. Have you any idea of what the weight of water is in tons that that tank would hold?

A. No, sir, I can't remember.

Q. And with respect to tank 2, do you know what quantity of water tank 2 would hold?

A. No.

Q. And with respect to ballast tank 3, do  
318 you know what quantity of water that would hold?

A. No, sir.

Q. Do you know what the weight of the water would be that it would hold?

A. No, sir.

Q. Take the after-peak tank, or the forward-peak tank, do you know what weight of water either one of those would hold?

A. No, sir.

Q. Do you know how many gallons of fresh water there is to a ton?

A. No, I don't remember that now.

Q. Do you know how many gallons of salt water there is to a ton?

A. I can't remember it now.

Q. And your ship had water-ballast tanks?

A. Yes, sir.

Q. And you have no idea of what the water weighed?

A. No, sir.

Q. Have you any idea, approximately, of what a cubic yard of medium size anthracite coal would weigh?

A. No, sir.

Q. Or of any kind of coal?

A. I have forgotten it.

Q. And you have no idea of it?

A. No, sir.

319 Q. And I understood you put this cargo on without knowing what the weight of your cargo was, without any idea of it?

A. No, sir. I never looked at the cattle when they were weighed.

Q. You know they were weighed right there by the ship?

A. Yes, sir, by Armour's people.

Q. So that you could very easily have found out just what the weight of the cattle was that were going aboard?

A. Yes; but I had something else to do than to look after weighing the cattle.

Q. And those that were attending to the weighing of the cattle, did you ask them anything about the weight, if they would give you the weight?



A. No, sir.

Q. You have no doubt that they would have given you the weight if you asked for it?

A. I only wanted the number of them.

Q. You only counted the number of them, that is all?

A. That is the mate's business, to get the number of the cargo and put them in the log book.

Q. What was the dead weight tonnage of the "Fort Morgan"?

A. I don't remember that now.

Q. What was the gross weight tonnage of it?

A. 1200.

Q. How much?

A. 1,220, I believe.

320 Q. What was her net tonnage?

A. Well, I can't remember it.

Q. And with respect to the gross tonnage, which you say you believe was ten something, do you know or have you any idea, really, what it was?

A. That should be on the charter party.

Q. But I am asking you.

A. No, I don't remember it now.

Q. Captain, what are the most important considerations in ballasting a vessel, say first with regard to the amount of ballast that is put in?

A. I don't recall. That all depends on the ship, how the ship is, topheavy or light. You put enough in to secure stability.

Q. And with regard to the position of the ballast, where should it be put?

A. In the bottom of the ship.

Q. And what should be done with regard to securing your ballast in that ship?

A. Fill the tanks full.

Q. Well, suppose it is not water.

A. She is always floating in the water.

Q. Well, I am speaking of vessels generally. You said the tanks full, I believe, when I said with regard to securing the balance. Haven't you sailed on vessels carrying other than water ballast?

321 A. Yes, I sailed vessels when we took in sand ballast and all kinds of ballast—rock ballast.

Q. In other words, any deadweight stuff that you could get into the bottom for the purpose of giving her stability?

A. Yes, sir.

Q. Whether it be rocks or coal or cargo or anything that would be heavy that you could get in the bottom?

A. Yes, sir.

Q. And the purpose of that was to give her stability?

A. Yes, sir.

Q. That was to prevent her from turning over?

A. Yes, sir.

Q. Now Captain with regard to the stability of a ship do you know what is meant by "curve of stability"?

A. No.

Q. What do you understand by the "stiffness" of a vessel, Captain?

A. It is so that she can stand—on a sailing vessel—the pressure of the sail; and in steamboats so that in case of a heavy sea, in bad weather, that she will work easier on the sea.

Q. And that "stiffness" of a vessel means security of the vessel?

A. Sure.

Q. And that stiffness of a vessel is secured by ballast in the hold, is it not?

322 A. Yes, sir.

Q. Now, you were speaking about the fore-peak tank of your vessel not having been filled with water so far as you knew, as I recollect your testimony of yesterday. Supposing the fore-peak tank was pumped up, how would you estimate the change of trim; or, rather, take it this way: Before pumping up the fore-peak tank how would you estimate what change of trim would be brought about by pumping that tank up? Do you know the formula or the rule for determining that?

A. Yes. That would bring the ship down by the head.

Q. You say you know the formula for estimating this change of trim. What is that formula?

A. Formula?

Q. Formula, yes. I asked you if you knew the formula for determining what the change of trim would be in the ship where the fore-peak tank was empty and then you pump that fore-peak tank up.

A. She would go down by the head.

Q. No; I asked you if you knew what the formula was for determining it, and you said you did, and I ask you now what is that formula.

A. I don't know what that means.

Q. What was the draft of the "Fort Morgan" on leaving Port Limon?

A. I can't remember it.

323 Q. What was the usual difference in draft between the stem and stern?

A. Generally two feet.

Q. In other words, she was two feet more by the stern than by the head; that is to say, she was drawing two feet more at the stern?

A. Yes.

Q. Now would pumping up the fore-peak tank on the "Fort Morgan" put her down by the head?

A. Yes.

Q. With her having two feet more of water astern than forward?

A. Sure it would put her down by the head.

Q. How many tons would be requisite to put that vessel down by the head?

A. I don't know. I can't tell. I never tried it.

Q. Would it take a hundred tons to overcome the two feet?

A. No.

Q. But just how many tons it would take you don't know?

A. No.

Q. Captain, going back to the matter of that protest or statement that was made by you to the captain of the port, or before the captain of the port of Port Limon, it appears from the copy that I have of that report that you stated to the port captain as follows: "I must say also that to my judgment the cattle was properly stowed and tied to make the voyage without any danger." Is that correct?

324

A. That was my belief when we left the wharf.

Q. That was your belief and judgment. Do you remember that when the statements were taken down and given by yourself and other officers and members of the crew of the vessel Mr. Wilkinson, the supercargo for Armour & Company, also made a statement?

Mr. Flint:

That is objected to as incompetent, irrelevant and immaterial, it not being shown that the witness was present or heard the statement.

A. I don't know. I don't remember it.

By Mr. Grace:

Q. You don't know whether Mr. Wilkinson made a statement there before the captain of the port?

A. I can't remember it.

Q. Did you get a copy of those statements that were made before the captain of the port there at Port Limon?

A. No, I thought I had it, but I can't find it. In fact I haven't had any time to look for it.

Q. Well, the question is not whether you could find it or not, but, as a matter of fact, did you get a copy from the captain of the port?

A. I can't remember it.

Q. You don't remember whether you did or not. Now, Captain, on yesterday, during the course of your examination, you were asked with regard to statements made by the surveyors, and my recollection is that you stated  
 325      that you didn't receive any copy of any report  
          made by the surveyors themselves.

A. Well, I don't remember that. If there was any they lay on board the ship amongst the other papers—with the log book.

Q. And, as I recollect your testimony, you stated there that you were certain that those surveyors said that your vessel was seaworthy.

Q. Well, I made a protest, that Mr. Burge had the other day, didn't I?—that she was seaworthy the same as she was when she left New Orleans; that she was in the same seaworthy condition as when she left New Orleans on the down trip.

Q. Who made that?

A. I made a protest to the—

Q. Oh, you made one?

A. Yes.

Q. But I am speaking about the survey that was made by Heckman, Sorrensen and Doswell. In discussing that survey yesterday my recollection is that you said you were certain that they stated in the survey that your vessel was seaworthy. Now, as a matter of fact, is that your opinion, that they made any such statement as that?

A. Well, I can't remember. But if she wasn't seaworthy she couldn't have left the port.

Q. You left in ballast, though, didn't you?

A. Yes, sir.

Q. Being seaworthy to leave in ballast is one thing and being seaworthy to leave with a cargo is a vastly different thing, is it not?

A. Yes, sir.

Q. Now Captain, you say you have no recollection of whether you received that report of the survey or not?

A. No, sir, I can't remember.

Q. I have here before me a letter dated at Port Limon, Costa Rica, December 8, 1917, from the United Fruit Company, for Lloyd's agent, by H. C. Woodward, addressed to Mr. William Lacheur Lyon, Lloyd's agent at San Jose, in which he says: "In accordance with your instructions we enclose herewith, in duplicate, certified copy of proceedings, taken by the captain of the port of Port Limon, in connection with the accident to the SS 'Fort Morgan' and report of survey, on that vessel.

"We have had the port captain's signature authenticated by the acting British consul, and the latter's by the American consul, surveyors' signatures having been attested by the American consul.

"We have furnished one copy of each of the above documents to the following: Master SS 'Fort Morgan,' O.

R. Whilden, president, Central American Cattle Company, Inc., time charterers of the SS 'Fort Morgan'; also one copy of survey to Mr. Mitchell, representative of Armour & Company, shippers and consignees of the 'Fort Morgan's' cargo, and taken their receipts for same which are enclosed herewith."

Now, Captain, having read that to you, in  
 327 which this party makes the declaration that they furnished you a copy of each of those two documents and took your receipt for them, what have you to say to that?

A. Well, I don't remember. If I had it it is laying on the ship, because I never kept the ship's documents after I left.

Mr. Grace:

We produce and file in evidence in connection with the cross-examination of the witness the original report of survey made by Messrs. Heckman, Sorrensen and Doswell purporting to bear the signature of each of the surveyors, and the certificate of the United States consul at Port Limon, and will ask that it be marked for the purpose of identification "Armour & Company Exhibit B-5."

Mr. Flint:

It is objected to as incompetent, irrelevant and immaterial and not admissible.

328

Port Limon, Costa Rica,  
December 3rd, 1917.

Messrs United Fruit Company,  
Port Limon, C. R.

Sirs:

Pursuant to your instructions on behalf of Wm. Le Lacheur Lyon, Lloyd's Agent in San Jose, Costa Rica, we the undersigned, repaired on board the Steamship "Fort Morgan," of Bergen, Norway, of 1119.93 tons gross, 631.76 net tons, triple expansion engine, 200 nominal horsepower, official signal J. Q. D. C., for the purpose of surveying and reporting to you the cause or causes of her taking a heavy list while on a voyage from this port to Jacksonville, Fla., U. S. A., with a cargo of live steers; her subsequent return to this port in distress, and present seaworthiness.

No plans are available on board showing tank capacities, etc. The Chief Officer and Chief Engineer state that the tanks have approximately the following capacities:

Fore Peak Tank .....	23 tons
No. 1 Tank .....	35 tons
No. 2 Tank, which is subdivided	40 tons
that is 20 each side.	
No. 3 Tank .....	35 Tons
After Peak Tank .....	12 Tons

This ship has no ballast tanks amidships under her engines or boilers.

The following is the condition of the tanks according to statements of the Chief Officer and Chief Engineer, when vessel sailed from this port at 6 p. m. on November 29th, 1917:

329



Fore Peak Tank—Empty.

No. 1 Tank—Contained 14 inches of water.

No. 2 Tank, starboard side—30 inches of water—Full.

No. 2 Tank port side—About 5 tons of water used out of it.

No. 3 Tank—Full.

After Peak Tank—Empty, not in condition to be used for water.

On sounding we found 14 inches of water in No. 1 tank, and upon inquiring as to why this tank had not been pumped full, learned from the Chief Officer and Chief Engineer that this tank had never been filled to its capacity since they had been in the ship, the Chief Officer and Chief Engineer stating that they understood it leaked when so filled.

We found starboard side of No. 2 tank full of water, and port side of this tank empty. Chief Engineer reports that when ship took the heavy list they pumped some of the water from the port side of No. 2 tank into the forepeak tank, and the balance overboard, so as to lighten steamer on port side. We found No. 3 tank with 18 inches of water, Chief Engineer reporting that he had used water from this tank for boilers since putting back from sea.

We found all bilges dry, with the exception of Port, Forward Hold Bilge, which had about 14 inches of water; this probably being due to rain and drainage from holds, as hatches were open all the time and during heavy rain.

We found part of the cattle fittings intact and that the balance had been removed. On investigating with stevedores and crew we learned that the cattle fittings held intact until partly removed by stevedores

330 in order to discharge the live steers at wharf when steamer was heavily listed to port, and in order to dump the dead animals at sea; and partly by crew after completing discharge in cleaning up holds, etc.

On investigation in regard to bunker coal, we find this vessel had on board two hundred and twenty-five long tons of coal when the loading of cattle at this port was commenced. Of this amount about two-thirds was in the shelter deck bunker, and the balance in the cross-bunker which reaches from the shelter deck to the ship's bottom; all evenly divided on both sides. Chief Engineer reports that from time of commencing loading until ship took list and put back for Port Limon, 12 tons of coal were consumed.

We attribute the cause of the steamer not righting herself after taking a heavy roll, due to insufficient ballast, considering the nature of the cargo and amount of top weight, which consisted of coal in shelter deck bunker and cattle above the shelter deck.

We consider the ship is now seaworthy while in ballast or if loaded with a heavy cargo which would give her sufficient stability not to require ballast in No. 1 tank. Before loading a light or movable cargo, or deck load, which would necessitate the use of No. 1 tank for ballast, we recommend that this tank be tested, and if found leaky, as reported, satisfactorily repaired, and retested.

We also recommend that in case of reloading  
331 a similar cargo of Cattle, that tanks Nos. 1 and 3 be filled to their capacity and kept so during the entire voyage, and that an additional one hundred tons of ballast be secured in the holds; and that in case tanks Nos. 1 and 3 cannot be filled to their capacity and

kept so during the voyage, a further amount of ballast be secured in the holds equal in weight to that of these two tanks when filled with water ballast. In case steamer sails from this port without having No. 1 tank tested and repaired if necessary, we recommend that this be done at the earliest convenience, and specially before loading a dry cargo or one necessitating the use of this tank for ballast.

Respectfully submitted,

(Signed)      FREDERICK HECKMAN,  
O C 039016, Marine  
Superintendent.

(Signed)      YNGVE SORENSEN,  
O. C. -A- 3016, Asst. Marine  
Supt.

(Signed)      C. D. DOSWELL,  
S. S. Agent, by appointment  
from Wm. Le Lacheur Lyon,  
Lloyd's agent in Costa Rica.

Given under my hand and seal of office this 3rd day  
of December, 1917.

(Signed)      STEWART E. McMILLIN,  
U. S. Consul.

(Consular Seal)  
(Stamp:) American  
Consular Service

\$2

Fee Stamp  
Port Limon, Costa Rica.

332 By Mr. Grace:

Q. Captain, did you have any accident at all with that ship "Fort Morgan"?

A. No, sir, not a bit.

Q. At no time?

A. No, sir.

Q. Did you ever have a salvage crew or salvors on board at any time?

A. No, sir.

Q. When was the last time that the steamship "Fort Morgan" was in dock previous to this trip for the Armour Company?

A. As far as I can remember, somewhere around six months. Of course I recollect the United Fruit Company—or the fruit companies usually put their ship in dock every six months.

Q. That is, the United Fruit Company operating vessels in that trade dock their ships every six months?

A. Yes, sir.

Q. Now, whether the "Fort Morgan" was docked within six months of the time of the Armour & Company trip you don't know, do you?

A. I guess about six months before she was in dock. Somewhere about there. I couldn't tell. Six or eight months.

Q. In that radiogram which I showed you yesterday, marked "Armour & Company Exhibit B-3", addressed to Mr. Burge,—he was the president of the owning company, was he not?

A. Yes, sir, at that time.

Q. You advised him that the "Fort Morgan" required dry-docking and some repairs. "Last drydock New Orleans May 19, 1917." She was not docked after that May 19, 1917, so far as you know, was she?

333

A. No.

Q. I presume you took that from your log book, didn't you?

A. Yes, sir. That is in the log book. Only small repairs had been done to the engine, but not serious.

Q: What were those small repairs that were done to the engine?

9. The pumps—

Q. What was the matter with the pumps?

A. Well, you have always got small repairs every two or three trips.

Q. Yes, but what was the matter with the pumps?

A. Oh, I couldn't explain it, because that is the engineer's work.

Q. I know. You have undertaken to interpret this wireless you have sent as referring to small repairs, nothing serious, but I would like to get from you what those small repairs were.

A. Well, I couldn't explain to you, because I got that from the engineer.

Q. In other words, the engineer told you what repairs were to be made?

A. Yes. Small repairs. They do that the same time she is in dock.

Q. And just what those repairs were you  
334 don't know?

A. No.

Q. The ballast tanks were in the engineer's department, were they not?

A. No; there was a water tank forward, and a fresh water tank for the ship's use.

Q. Are not the ballast tanks that the engineers look after, attending to the pumping of the water in and out?

A. Yes, sir. The engineer, yes, sir.

Q. And if there is anything wrong with those tanks it is the engineer's duty to report it to you?

A. Yes, sir.

Q. And whether there were small repairs needed on those tanks to prevent them from leaking or not, you don't know?

A. No, sir. As a general rule, when she comes to the dock they call the Lloyd surveyor and it is fixed by his orders.

Q. Now you said that there was trouble with the pumps. Couldn't you tell us something more definitely as to what the trouble was with those pumps?

A. No, I couldn't say anything about that. She was surveyed once by the United Fruit Company's engineer.

Q. Well, Captain, I am not interested in anything you may tell me as to what somebody else conducted in the way of a survey, because that is not something that was done under your personal supervision, and the results reported by them are not results within your personal knowledge. What I want to get at is  
335 facts that you know, not what someone else may have examined or reported on.

A. Well, I didn't know what it was.

Q. But you understand there was some work to be done to the pumps, and what the work was you don't know; is that it?

A. Well, there was no necessity for anything at all. She was passed, and she was all right the way she was.

Q. Well, Captain, you sent a wireless from Port Limon to the president of the company owning that vessel, and therefore, a statement by you that is not suspicious, and in that statement, as shown by "Armour

Exhibit B-3", signed by you, your signature attached, you advised your owners that the "Fort Morgan required drydocking and some repairs." Now I have been trying to get from you what those repairs were, and you said there was something to be done to the pumps, and so forth.

A. Yes, many small repairs that a ship requires all the time, especially when she goes into drydock, at the same time.

Q. If it was a matter of ordinary wear and tear you would not have to be wiring your company on every trip that you are needing small repairs?

A. Yes, sir, when she goes into drydock I have to report it so that it can be done at the same time.

Q. Oh, yes, when she goes in drydock?

A. Yes.

Q. Now, your advice to them was that she should be drydocked and also that she required repairs?

A. At the same time.

336 Q. Now, just what those repairs were I have been trying to get from you, if you know. If you say it was just simply that the engineer reported to you that repairs were to be made, and that that is all you know about it, we will let it go at that.

A. Yes, that is all it is. She also left New Orleans without docking and repairing, on the trip after, because the drydock was engaged when she was there.

Q. Now, Captain, you are volunteering that statement. I didn't ask you anything about that. Did the engineer, when he advised you that repairs were necessary, give you a list of what repairs had to be made?

A. No, sir.

Q. Now is it not a fact that you wired information to the owners because the surveyors had indicated that

certain work was to be done on the tanks, that certain testing was to be done, and if found leaking that they were to be repaired?

A. I can't remember it. I spoke to the engineer that we will have something fixed when we get up there, at the same time.

Q. If the fore-peak tank was in condition to hold water and the after-peak tank was in condition to hold water and they had been filled up before leaving Port Limon on this trip in the last of November, 1917, how much would the weight of water in those two tanks put the ship down?

A. I couldn't tell.

337 Q. How much would the weight of the water in those two tanks have given the ship the benefit of in the way of ballast?

A. I couldn't tell. The ballast she had in on the previous trip with cattle, she behaved fine with the same amount of ballast, the same tanks full.

Q. Do you mean the fore-peak and the after-peak tanks were filled on the trip you had previously made with cattle, on the trip prior to the trip you had made in November with the Armour cattle—or had attempted to make?

A. I don't know if the engineer had any water in those two tanks.

Q. You mean in those two peak tanks?

A. Two peak tanks. I never knew of their having been filled, neither of them.

Q. You have never known of their having water in them, have you?

A. No, sir. Because it never needed it.

Q. But what I am asking you is, if the fore-peak tank and the after-peak tank had been filled with water be-



fore this vessel left Port Limon in the latter part of November, 1917, with the Armour cattle on board, how much effective ballast with that have afforded the steamship "Fort Morgan"?

A. I couldn't tell. I don't know.

Mr. Grace:

That is all.

Re-Direct Examination.

338 By Mr. Flint:

The Witness:

Excuse me. Can I ask a few questions?

Mr. Flint:

Do you want to make a correction?

The Witness:

Yes. Yesterday when you asked me if I had any letters or wires from the owners I said no. I thought you asked me if I had any writing from them after the thing happened, after I left New Orleans, and I said no. Of course I didn't hear anything from them after I left the ship until just about a month ago.

By Mr. Flint:

Q. I call your attention to a "Marine Note of Protest" signed by you as master, subscribed and sworn to before a notary public on the 17th day of December, 1917, (handing document to witness). I will ask you to examine that protest.

A. Yes, sir.

Q. Is that your signature?

A. Yes, sir.

Mr. Flint:

We offer this in evidence as "SS Fort Morgan Exhibit A."

Mr. Grace:

It is objected to upon the ground that this note of protest is incompetent, irrelevant, and immaterial, and inadmissible, and a self-serving document.

339

### Marine Note of Protest.

Port of New Orleans, State of Louisiana, United States  
of America.

December 17th, 1917.

On the 17th day of December in the year of our Lord Nineteen Hundred and sixteen before me, Gus J. Ricau, a duly commissioned Notary Public, personally came and appeared, Thomas Johannsen, Master of the Steamship called the Port Morgan of 632 tons net register, or thereabouts, and declares that on the 29th day of November, last past, he sailed in and with the said ship from the port of Limon, Costa Rica, laden with a cargo of cattle and returned in the said ship at Limon on same date, to-wit: November 29, 1917, at 9:00 p. m. That when he left said port, his tanks were properly filled but that the ship listed about 7 degrees; that after being out about 15 miles, heavy seas were encountered, which caused the ship to list heavily to port 37 degrees and that being unable to right said ship by the trimming tanks and bunkers, affiant returned to port in order to save ship and cargo. Affiant further says that he arrived in New Orleans, Louisiana, on the 11th day

of December, 1917, after having been detained in Port Limon with the duties of caring for the safety of the cargo and the ship.

And the Master hereby enters his note of protest to serve and avail him hereafter, if found necessary.

THO. JOHANNESSEN, Master.

Sworn to and subscribed before me, Gus J. Ricau, Notary Public, this 17th day of December, 1917.

Not. Pub.

SS Ft. Morgan Exhibit A.

Filed 9/18/19.

John P. Doyle, Notary.

340 By Mr. Flint:

Q. You have testified on your direct examination and on your cross-examination that some person representing Armour & Company had charge of the cattle.

A. Yes, sir.

Q. What was his name?

A. Wilkinson.

Q. Did he make any statement to you in reference to why he was sent there to load the cattle?

A. Yes, sir; he told me he was sent from the Armours down to take care of the cattle and load them.

Q. Did he state to you what experience he had in that kind of work?

A. Yes, sir.

Q. What did he state?

A. He said he had been on two trips over to England with cattle for Armour, and that he was sent on board to see that the cattle weighed just so much when they left the ship as when they came in, and to take full charge of the cattle.

Q. In one place in your testimony, as I recollect it, you stated that Mr. Wilkinson, or Mr. Whilden, was connected with the Gulf Coast Plantation & Steamship Company. Is that a fact, that they or either of them were connected with that company?

A. Mr. Whilden was president of the Central Cattle Company, and he was also charterer of the boat. He had chartered the boat, and the boat was in his command.

341 Mr. Grace:

You are referring only to Mr. Whilden. You may inquire as to Mr. Wilkinson also, because he was the Armour man.

By Mr. Flint:

Wilkinson had nothing to do with either one of these companies?

A. Nothing except Armour.

Q. He represented Armour alone?

A. He represented Armour alone.

Q. Are you sure Mr. Whilden had anything to do with the Gulf Coast Plantation Company?

A. No; the steamship company. He chartered the boat, and the boat was left to him.

Q. Well, wasn't that in connection with the Central American Cattle Company?

A. He was president of the Central American Cattle Company.

Q. Did he have anything to do with the Gulf Coast Plantation & Steamship Company?

A. Nothing except he had hired the boat.

Q. As I understand it, your boat listed at about 7 degrees.

A. Yes, sir.

Q. Was that the ordinary list of the boat?

A. No, not the ordinary list, because she was sometimes straight and sometimes a little listed.

Q. Sometimes she did straighten up?

A. Sometimes she was straight, yes, and sometimes she had a list, but most generally she had a list  
342 to port side.

Q. And was a list of 7 degrees any more than she had listed on prior trips?

A. She had more list than that many times leaving port.

Q. And, as I recollect from your testimony, while you were at the dock she listed to port?

A. Yes, sir.

Q. And before sailing you started in to straighten her up?

A. As soon as we left, yes, sir. As soon as the cattle was in and she was slightly listed we started to use coal from the port side.

Q. Who had charge of the cattle on board the vessel after you left Port Limon?

A. Mr. Wilkinson.

Q. Who took the water out of the tanks?

A. The engineers.

Q. At whose direction?

A. At Mr. Wilkinson's.

Q. As I understand it, you have testified that your instructions to the engineer were to fill all the tanks.

A. What could be filled.

Q. And, as far as you are advised, that was done?

Mr. Grace:

That is objected to as leading and suggestive.

A. Yes, sir.

By Mr. Flint:

Q. Now you have testified in reference to the coal sliding to the port side. Did the coal slide to  
343 the port side prior to or after you were struck by the ground-swell off the key?

A. Yes, we were struck by the swells.

Q. Was there any sliding of the cattle to port side before that?

A. No, sir.

Q. And after the ground-swell had struck the vessel it was sufficiently heavy to throw the vessel to port side and shift the coal?

Mr. Grace:

That is objected to as leading and suggestive.

A. Yes, sir.

By Mr. Flint:

Q. And also sufficiently heavy to throw the cattle down and over on the port side?

Mr. Grace:

Objected to as leading and suggestive.

A. Yes, sir.

By Mr. Flint:

Q. And prior to that time there had been no shifting of the cattle or the coal to port side?

Mr. Grace:

Objected to as leading and suggestive.

A. No, sir.

By Mr. Flint:

Q. And as far as you are advised, none of the water tanks leaked—

A. Not so far as I remember.

Q. —except the water tank used for the crew for drinking purposes?

A. Yes, sir.

Q. And that tank was at the top where it  
344 couldn't run out other than when the boat was rolled and it slushed out through the small holes?

A. Yes, sir.

Q. How large were those holes?

A. Oh, I don't remember. They were only small holes.

Q. Well, what do you mean by a small hole?

A. Oh, a quarter of an inch and so on.

Q. As I understand it, when you left the port of Port Limon on November 29th the vessel didn't list sufficiently or have any other defects that, in your opinion, would not warrant you to go to sea.

Mr. Grace:

Objected to as leading and suggestive.

A. Yes, sir.

By Mr. Flint:

Q. You say, "Yes, sir",—

A. Well,—

Q. Did the vessel list sufficiently or have any defect in it in any way that you did not consider that it was in condition to go to sea?

A. No, sir.

Mr. Flint:

That is all.

Re-cross Examination.

By Mr. Grace:

Q. What was the size of the rope—not in length—but the size of the rope the cattle were tied with?

A.  $3/4$  inch in diameter, as I remember.

345 Q. What was the breaking strain of that rope?

A.  $3/4$  inch.

Q. No; what was the breaking strain of that  $3/4$ -inch rope?

A. That depends on the quality.

Q. Well, that kind of rope that you had there.

A. Well, that is hard to say. I can't tell, because it may have been laying in the sun and had got rotten.

Q. To all appearances that was all good  $3/4$ -inch rope?

A. It was half an inch.

Q. Now you change it from  $3/4$  to half-inch?

A. Yes, because I can't recollect it.

Q. How?

A. I can't remember it. That is the best of my belief.

Q. Then it may have been anywhere from half to  $3/4$ -inch rope?

A. Well, there is only half and  $3/4$ -inch.

Q. And so far as you recollect that was all perfectly good rope?

A. I can't tell about the rope down there, because it may have been laying down there in the slush and been rotten.

Q. A great many things may have happened, but so far as you recall it may have been perfectly good rope?

A. I didn't try it.



Q. No, but is there any reason for you to believe it was other than good rope?

A. It looked to be good, but I couldn't say  
346 whether it was good or not.

Q. What kind of rope was that—manila rope?

A. Manila.

Q. I will ask you what is the breaking strength of half-inch manila rope.

A. I don't know.

Q. Do you know anything at all about ropes?

A. Yes, sir.

Q. Well, what is the difference between a cable-laid rope and a hawser-laid rope?

A. A cable-laid rope is made of three ropes into one, and a hawser rope is made the plain way.

Q. How many yarns, how many strands, are there in a hawser-laid rope?

A. I don't know.

Q. How many in a cable-laid rope?

A. I don't know.

Q. Now, don't you know, as a matter of fact, that there is no difference between a hawser-laid and a cable-laid rope, that they are both the same?

A. It is not.

Q. How?

A. A cable-laid rope is made of three ropes—a tow cable.

Q. Isn't a hawser-laid rope and a cable-laid rope one and the same kind of rope?

347 A. No, sir.

Q. How?

A. No, sir.

Q. Then tell me what the difference is between the two, if you understand there is a difference.

A. A cable rope is made of three ropes put into one, and a hawser rope, is made of manila or grass, is made plain, with three strands in one solid rope.

Q. Three strands in one rope. What is a strand?

A. Put together of rope yarns.

Q. How many rope yarns?

A. According to the size of the rope.

Q. How many yarns are there to the strand?

A. According to the size of the rope.

Q. Well, we are talking about hawser rope now and cable rope. Take the hawser rope.

A. There are many different kinds of hawsers.

Q. Start with the yarn and tell us how the hawser-laid rope is made—how many yarns, and how they are twisted, and how many strands, and how they are twisted, and so on.

A. They make the yarns first—

Q. How many yarns?

A. They make all kinds of it, enough to make a strand, according to the size of the rope they make.

Q. How many yarns to start with?

A. If it is half-inch rope they generally use  
348 four or five in a strand.

Q. Now, you are speaking about a hawser rope. A one-half inch hawser?

A. No; in a hawser they will use—I couldn't tell exactly, but I would say about 20 in each strand.

Q. You have never seen or heard of a half-inch hawser, have you?

A. No.

Q. Then we will cut the half inch business out. Now the question is how many yarns, how many strands, are there in the hawser.

A. I don't know.

Q. Nor in the cable either?

A. I don't know. I never counted them.

Q. Are the yarns laid up right or left-hand in the hawser?

A. Left-handed.

Q. I am speaking of the yarns.

A. The yarns are laid left-handed.

Q. And the strands?

A. Right-handed.

Q. You are sure of that?

A. As far as I remember.

Q. Then you are not sure of it?

A. Not quite.

Q. And with regard to the yarns and strands in the cable-laid rope, you are not sure of that either,

349 are you?

A. No, sir. I never counted them.

Q. And with regard to a shroud rope, do you know how that is laid up?

A. Yes, sir; that is laid the same as a hawser.

Q. A shroud rope is the same as a hawser?

A. Laid the same way.

Q. Are you sure of that?

A. Yes, sir.

Q. Do you know whether a shroud rope has a heart to it or not?

A. It has got a heart in it.

Q. A shroud rope has a heart to it?

A. Yes, sir.

Q. And a hawser hasn't, has it?

A. No, sir.

Q. Then the hawser and shroud are not made in the same way, are they?

A. No.

Q. What weight will a one-half inch manila rope sustain before it will break?

A. Well, sir, I never know. I never tried it.

Q. Now, I understood you to say yesterday that you saw two ropes, that is, where two cattle were secured, that had broken in that cargo.

A. Yes, sir, I saw the rope around their neck.

Q. And that was all that you did see?

350 A. I didn't notice any more. According to my remembrance there was all kinds of ropes around, but I just noticed two as far as I remember.

Q. If Mr. Wilkinson had made a statement that all the ropes held, you are not prepared to deny that, are you?

A. Well, I saw two ropes on the neck of the cattle while they were taken offshore and put on the pile of dead ones.

Q. And outside of those two ropes you are not prepared to deny his statement that the ropes held?

A. I can't deny it, no—because I seen those ropes on the cattle, and that is all I can explain.

Q. They took out the dead cattle as well as the live cattle when you were at the dock?

A. Yes.

Q. And then reloaded the dead ones on to be taken out to sea?

A. Yes, sir.

Q. Do you know what the weight of any one of the cattle was?

A. No, sir, I don't know a bit.

Q. Do you know, as a matter of fact, that a one-half inch rope such as was used there—that they could hang up a whole cattle by it, clear from the deck?

A. Yes, sir.

Q. The "Fort Morgan" was a steamship?

A. Yes, sir.

351 Q. Now, when she would list to one side or the other that would affect the water level in the boiler, would it not?

A. Yes, to a certain extent.

Q. The greater the list the greater the angle that the water would be at in the boiler, would it not?

A. Yes, sir.

Q. The list might be so great as to expose some of the flues in there, would it not?

A. Not hardly.

Q. That you are not certain of, are you?

A. No, sir. I don't think it, hardly.

Q. With the ship having a 45 degree list don't you know that that was bound to expose some of the flues in her boiler?

A. That is the list she had when she came back in the harbor.

Q. And with that list don't you know that some of her flues in the boiler were bound to be exposed?

A. Well, but it didn't happen.

Q. And don't you know that by exposing the flues in the boiler there was danger of blowing her boilers out? Don't you know that as a master of a ship?

A. Yes, sir; but the engineer was there, and he knew more about it than I did.

Q. It was a case of where the engineer had taken the chances of being blown up by the boiler getting low or the ship turning over at sea, was it not?

352 Mr. Flint:

I object to that as incompetent, irrelevant and immaterial.

A. Yes, sir. He would take care of himself.

By Mr. Grace:

Q. When you carried the cargo of cattle on the trip from—where did you say it was?

A. Port Cortez to Havana.

Q. Did you furnish the cattle with water?

A. Yes, sir.

Q. Where was the water taken from?

A. Some from New Orleans and some from Cortez.

Q. But what part of your ship was the water taken from that was supplied to the cattle from the tanks?

A. Out of the ship's tanks, yes, sir; the same as at Port Limon.

Q. So that the same procedure was adopted when you carried that carload of cattle from Port Cortez to Havana that you were attempting to follow when you were carrying the Armour cattle from Port Limon?

A. Yes, sir.

Q. Is it not a fact that in your statement to the port captain at Port Limon you stated that your vessel was listed at the wharf and that from the time you left the wharf until you got back to Port Limon she was continually going over gradually to port?

A. Yes, sir.

Q. Were there, so far as you know, any exposed steam pipes that the cattle came in contact with?

A. No, sir.

Q. Is it not at fact that some of the dead cattle there were burned to death on some of the steam pipes when that vessel had turned over to a list of 45 degrees or thereabouts?

A. Well, I remember the cattle was dead lying against the steam pipe on deck after being heaved up from the hold. In fact there was no steam pipe in the hold.

Q. So the one that was burned by the steam you say was a dead one that had been hoisted up?

A. Yes. I think I remember that.

Q. Was there a five one that was hoisted up and burned by the pipe, then?

A. No. They didn't leave the live ones on deck; they took them right ashore.

Mr. Grace:

That is all.

By Mr. Flint:

Q. As I understand it, this map, Armour's Exhibit 4, you have testified that you do not know whether it is accurate as to the exact form of the vessel or not.

A. No, sir, I don't know the exact form of the vessel.

Q. And the location of the cattle as shown by this map or sketch is merely a guess on your part?

A. Yes, sir. Just guesswork.

Q. And merely for the purpose of figuring out the total number of cattle on board?

A. Yes, sir.

354 Mr. Flint:

That is all.

Mr. Grace:

That is all.

The Witness:

I beg pardon. There was only two things I would like to explain. There was that thing there where you questioned me whether I had any telegram or anything from the owner of the ship, and I said no. But you asked me if I heard anything from the time I left the ship at New Orleans until—

Mr. Flint:

Well, you have already explained that.

The Witness:

And the other thing is about the crew refusing to go out with the ship, yesterday. I can't remember what he said when he came up on the bridge, when he refused—when he couldn't trim the bunkers any more. He complained he couldn't do it any more. And when the officers were on the bridge I made up my mind to turn back.

By Mr. Grace:

Q. In the report made by the port captain of Port Limon he states that he went out to your vessel. Do you remember him going out to your vessel?

A. Yes, sir; in the evening. I went ashore and got him.

Q. He says that "I immediately went on board and found that she was almost capsized, very heavily listed." That was the "Fort Morgan"?

A. Yes, sir.

Q. That is correct, is it not?

A. Yes, sir.

Q. "The captain told me that the crew refused to continue the voyage under those conditions." Now what have you to say to that?

A. Yes. Sure. They say, "We had better go back." They wanted to go back in.

Mr. Grace:

That is all.

Mr. Flint:

That is all.



(A recess was thereupon taken until 2 o'clock p. m., at which time, the same parties being present, the following proceedings were had:)

356           ROBERT T. BURGE, a witness called on behalf of the Fort Morgan Steamship Company, Ltd., claimant, respondent and petitioner, having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Flint:

Q. Please state your full name, age, residence and occupation.

A. Robert T. Burge; age 43; just now I have no special occupation; and my residence is Los Angeles, California.

Q. You are not engaged in any business at this time?

A. No active business.

Q. What was your business or occupation during the year 1917?

A. I was president of the Gulf Coast Plantation Company.

Q. Have you heard the testimony taken here during the past two days?

A. Only a small part of it.

Q. You heard reference made to the Gulf Coast Fruit & Steamship Company. Is that corporation the owner of the vessel?

A. No, sir.

Q. What relation does it have to the vessel?

A. None whatever.

Q. What is the name of the corporation that owns the vessel or did own the vessel on the 29th day of November, 1917?

A. The Fort Morgan Steamship Company, 357 Limited, of Norway; and the Fort Morgan Steamship Company of Norway chartered the steamer to the Gulf Coast Plantation Company.

Q. What position do you hold, if any, with the Gulf Coast Plantation Company?

A. President.

Q. What position did you hold with that company on the 29th day of November, 1917?

A. President.

Q. How long prior to that time had you been president?

A. About six months.

Q. And this corporation owns the steamship "Fort Morgan"?

A. No.

Q. I mean charters the steamship "Fort Morgan"?

A. Charters the steamship "Fort Morgan", yes.

Q. Was this vessel chartered by any other person or concern at or previous to the 29th day of November, 1917?

A. Yes.

Q. To what company or corporation?

A. The Central-American Cattle Company.

Q. When was that contract of charter made?

A. It was made on August 17, 1917.

Q. I will ask you to examine this time charter, the charter party being the Gulf Coast Plantation Company, to the Central-American Cattle Company, Inc., for the steel screw steamship "Fort Morgan", and ask 358 you if that is the instrument that was executed by you as president of the Gulf Coast Plantation Company, and if it is the document executed for the

purpose of chartering this vessel (handing document to witness).

A. It is.

Mr. Flint:

I now offer this document in evidence as "SS Fort Morgan Exhibit B."

Mr. Grace:

The offer is objected to as incompetent, irrelevant and immaterial, and inadmissible, in so far as libellants, Armour & Company, are concerned.

359 By Mr. Flint:

Q. Are you an officer of the Fort Morgan Steamship Company, Limited?

A. No, sir.

Q. Are you a director of that corporation?

A. No, sir.

Q. Was this vessel chartered to any other concern or corporation prior to the charter party of date August 23, 1917, by the Gulf Coast Plantation Company?

A. It was.

Q. To whom?

A. It was chartered prior to that time to the Cuyamel Fruit Company of New Orleans.

Q. For what length of time?

A. That was before my connection with the company, and I am unable to say just what the length of that charter was.

Q. Since your connection with the company have you entered into any charter party with any other corporation or individual other than the Central-American Cattle Company?

A. No, sir.

Q. Do you know the nature of the cargoes that the "Fort Morgan" carried prior to your entering into this charter?

A. She carried fruit cargoes principally, but also general cargoes on her southbound trips, returning usually with green fruit—bananas.

Q. Was this vessel specially built and equipped previous to the chartering thereof to the Central-American Cattle Company for the carriage of livestock?

360 A. No, sir.

Q. Did, as a matter of fact, the carriers of livestock as freight thereon require special equipment and changes and additions in the construction of the "Fort Morgan"?

Mr. Grace:

That is objected to as leading and suggestive.

A. It would.

By Mr. Flint:

Q. During the 26th, 27th, 28th and 29th days of November, 1917, do you know at what port the steamship "Fort Morgan" was?

A. She was in Port Limon, Costa Rica.

Q. From what port did the vessel sail for Port Limon?

A. New Orleans.

Q. Under whose control and management did said vessel sail?

A. Under the control and management of the charterers, the Central-American Cattle Company.

Q. Upon what date, if you know, did the "Fort Morgan" sail from the port of New Orleans?

A. Some time along about November 15, 1917.

Q. Do you know the nature of the cargo she carried on her departure at that time?

A. A general cargo, consisting of provisions largely.

Q. Do you know in what condition the "Fort Morgan" was as to seaworthiness and equipment on the date of her departure from New Orleans for Port Limon in November, 1917?

Mr. Grace:

That is objected to on the ground that a proper foundation has not been laid. The witness has not been qualified to testify along this line.

A. She was in a seaworthy condition.

By Mr. Flint:

Q. On what do you base your opinion that she was seaworthy?

Mr. Grace:

Same objection.

A. One reason, I might say, is that the charterers refused to sail the steamer until an examination was made to show that she was seaworthy.

Mr. Grace:

That is objected to as incompetent, irrelevant and immaterial and not admissible.

By Mr. Flint:

Q. On what other matters do you base your statement that she was seaworthy?

A. The mere fact that she had just returned from making another voyage, which voyage was made without mishap, and no reports had come to me from the crew or from anyone else that would indicate that she was not in seaworthy condition.

Q. Did you have the boat examined by Lloyds?

Mr. Grace:

That is objected to as immaterial.

A. You mean prior to this sailing?

By Mr. Flint: \*

Q. Prior to her sailing in November, 1917, to Port Limon.

A. I am unable to answer that question without looking up the records.

Q. After the chartering of the "Fort Morgan" to the Central-American Cattle Company do you know whether or not the latter sub-chartered the "Fort Morgan" and if so to whom?

Mr. Grace:

That is objected to as immaterial.

A. They sub-chartered her for at least one trip to W. R. Grace & Company, but that was after the steamer returned from Port Limon on the voyage referred to in these questions.

By Mr. Flint:

Q. Did you know anything about her being chartered to Armour & Company?

A. No, sir; I did not.

Q. After the execution of the charter party by the Gulf Coast Plantation Company to the Central-American Cattle Company of the steamer "Fort Morgan" on the 23rd day of August, 1917, did you or your company, or either you or they, by you or otherwise, have any further transactions, contracts, agreements or negotiations with the said charterer or any sub-charterer of said vessel or any other person, corporation or concern, consenting, agreeing to or allowing of the alteration, modification, or change of equipment of said vessel for the purpose of carrying livestock from any port?

A. We did not.

Q. As a matter of fact, if said vessel had been so changed, altered, modified or equipped for the purpose of carrying cattle at the execution of the charter party to the Central-American Cattle Company of date the 23rd day of August it was done without the knowledge, consent or agreement of the Fort Morgan Steamship Company?

363

Mr. Grace:

That is objected to as leading and suggestive, and as incompetent, irrelevant and immaterial, and inadmissible.

A. It was.

By Mr. Flint:

Q. Or of yourself personally as a representative of the Gulf Coast Plantation Company?

A. I did not.

Q. Did you, as president of the Gulf Coast Plantation Company, consent to or have any knowledge of any change in the equipment or altering of the "Fort Morgan" for carrying cattle?

A. I did not consent, but had general knowledge that some changes, that is, not changes, but some additions, some lumber had been put aboard the boat.

Q. When did you ascertain that?

A. If I remember correctly, I was in Kansas City during the time this steamer was in New Orleans, just prior to her sailing for Port Limon, but when I received telegraphic advice from Mr. Ellis, I think, that the steamer had met with an accident, I returned to New York.

Q. Do I understand from your answer that you did or did not know of the change in the equipment and the alteration of the vessel for carrying cattle prior to the accident on November 29, 1917?

A. I had indirect information or reports that some additional material had gone aboard for the  
364 purpose of putting in stalls for cattle.

Q. When was that?

A. That was prior to the date that the steamer sailed from New Orleans.

Q. Were you advised when the steamship "Fort Morgan" left Port Limon that she had been altered and changed and equipped for the purpose of carrying cattle as freight?

Mr. Grace:

That is objected to on the ground that the answer to the previous question shows that the witness did have such knowledge even prior to her departure from New Orleans.

A. I was not advised. In other words, I had no advice from the steamer while she was in Port Limon before sailing with the cargo of cattle.



By Mr. Flint:

Q. Were you advised in the latter part of November, 1917, or first of December, that the "Fort Morgan" had left Port Limon and had returned to port?

A. I had advice about that time that she had returned to port.

Q. Were you advised that she had cattle aboard at that time?

A. If I remember correctly, the telegram stated that she had returned to port and that a certain number of cattle had been killed or injured.

Mr. Grace:

This answer is objected to on the ground that the best  
evidence would be the telegram itself and not  
365 the vague and indefinite answer of the witness.

By Mr. Flint:

Q. Was that the first information that you had that cattle had been placed aboard the "Fort Morgan" as freight?

A. As I stated in a previous answer, that is the only information I had from the "Fort Morgan" after she arrived in Port Limon prior to her taking on the cattle cargo.

Q. After the steamship "Fort Morgan" had returned to Port Limon on November 29, 1917, do you know whether the steamship returned to the port of New Orleans, and if so when, and whether you were present at the port of New Orleans at the time of her return?

A. She returned about the first week in December, and my recollection is that I left New Orleans but returned within a day or two after the arrival of the steamer.

Q. On your reaching New Orleans after the "Fort Morgan" had returned to New Orleans did you have the vessel examined to ascertain whether or not it had been damaged and its then condition regarding seaworthiness and its condition of equipment, including its tanks and equipment?

A. I had a general survey made by a Mr. Wilson and by Captain Olaf Olson.

Q. Have you any instruments or documents or papers showing and certifying as to the condition of the "Fort Morgan" at that time?

A. Not in my possession now.

366 Q. What became of that paper?

A. If I remember correctly, I turned it over to Mr. Leovey.

Q. Do you know of your own knowledge whether or not, after the occurrence of the damage to the cattle at the port of Port Limon, the vessel or its equipment had been repaired, or whether it arrived at the port of New Orleans on December 14, 1917, in approximately the same condition in which it left the port of New Orleans on the date of its departure for Port Limon?

Mr. Grace:

That is objected to on the ground that a proper foundation has not been laid for this inquiry.

A. I know that it was not repaired, for the reason that no bills were submitted covering such repairs, and from the further fact that the captain told me no repairs had been made.

Mr. Grace:

That is objected to as hearsay testimony.

By Mr. Flint:

Q. Did you direct any repairs to be made?

A. I did not.

Q. Did you ever examine the steamship "Fort Morgan"?

A. Yes, sir.

Q. Did you examine the ballast tanks on the vessel?

A. I went with the Lloyds surveyors when they made the inspection that I referred to a moment ago.

Q. Did you examine the tanks at that time?

A. In a general way.

367 Q. Were they leaking at that time?

A. We found one small tank between decks with a capacity of about a ton of fresh water that had a small hole or two in the top of the tank, caused from being rusty.

Q. Could the water escape from the tank by reason of these rust holes?

A. It would be possible when the tank was full or very nearly full for the rocking or vibration of the steamer to force out small quantities of water.

Q. Did you examine the tanks on the "Fort Morgan" on her return to New Orleans after her return on or about the 14th day of December, 1917?

A. I had reference to this particular time and date in answering the last question.

Q. Prior to that date had you examined the tanks?

A. Only in a very casual way.

Q. Were you advised of the tanks leaking at any time?

A. None except the small tank that I mentioned in my answer to your question a moment ago.

Q. Did you personally, or for or on behalf of the Gulf Coast Plantation Company or any other person or

corporation, authorize, empower, consent or agree to or with any person, firm or corporation in the outfitting of said vessel or in making any new alterations or equipments so as to make her suitable for the purpose of transportation of livestock as freight?

368 Mr. Grace:

That is objected to as leading and suggestive.

A. I did not.

By Mr. Flint:

Q. If any such alteration, equipment of or change in the "Fort Morgan" was made for the purpose of carrying cattle was it done with your consent?

Mr. Grace:

That is objected to as leading and suggestive.

A. It was not.

By Mr. Flint:

Q. Or with the consent of your company, the Gulf Coast Plantation Company?

Mr. Grace:

Same objection.

A. It was not.

By Mr. Flint:

Q. Were you ever asked by any person, firm or corporation, or the charterer of any sub-charterer of the "Fort Morgan" to consent to the steamship "Fort Morgan" being altered or changed or equipped for the transportation of livestock as freight?

Mr. Grace:

All this line of examination is objected to as incompetent, irrelevant and immaterial and inadmissible.

A. I was not.

By Mr. Flint:

Q. Have you or has the Gulf Coast Plantation Company given the Central American Cattle Company, the charterer, or any sub-charterer, permission to do any act or thing not set forth in the charter party agreement?

Mr. Grace:

That is objected to as incompetent, irrelevant and immaterial and inadmissible.

A. No, sir.

369 Mr. Flint:

That is all.

### Cross Examination.

By Mr. Grace:

Q. Were you at any time interested in the Fort Morgan Steamship Company?

A. None except as a stockholder in the Gulf Coast Plantation Company.

Q. And in what way was the Gulf Coast Plantation Company interested in the Fort Morgan Steamship Company of Norway?

A. They held the stock of the Fort Morgan Steamship Company of Norway.

Q. What was the proportion of stock held by the Gulf Coast Plantation Company in the Fort Morgan Steamship Company of Norway?

A. Practically all of the stock.

Q. So that in fact the Gulf Coast Plantation Company was really the owner of the steamship "Fort Morgan"?

A. They were.

Q. You have been asked with regard to the equipment of the steamship "Fort Morgan", her seaworthiness, etc. Now, Mr. Burge, are you a naval architect?

A. No, sir.

Q. A builder of steamships?

A. No, sir.

Q. A shipwright?

370 A. No, sir.

Q. Do you know what equipment or outfit was required for the steamship "Fort Morgan" to make her seaworthy?

A. In a general way.

Q. No; I mean, in other words, can you write down the details of the equipment required by the steamship "Fort Morgan" to make her seaworthy?

A. I doubt my ability to do that.

Q. As a matter of fact you admit that you cannot, do you?

A. I will.

Q. For instance, could you give the weight of the anchors and the number of anchors a vessel of that kind should carry?

Mr. Flint:

That is objected to as incompetent and immaterial, because the witness has stated that he could not write down the details asked for.

A. A steamer of that kind requires two anchors.

By Mr. Grace:

Q. And what should be the weight of each one of those anchors?

A. I didn't find it necessary to become informed regarding those matters, for the reason that the law requires a steamer to be in condition, otherwise the authorities won't permit her to sail.

Q. You see you have testified here on your direct examination that that vessel was seaworthy  
371 when she left New Orleans, and the purpose of this cross-examination is to determine what knowledge you have of those things that are requisite in a seaworthy vessel. Now are we to take it that, instead of saying that she was seaworthy, you merely believe that she was seaworthy?

A. From information in my possession I was sure that she was seaworthy.

Q. But with regard to what the nature was of each and every particle of equipment, and the condition of that equipment, her machinery, tanks, etc., you have no personal knowledge?

A. Well, in answering that may I not state that not one steamship man in ten thousand has that information in his possession when he sails a steamer, and yet he knows that she is seaworthy or she wouldn't be allowed to put to sea.

Mr. Grace:

Please repeat the question to the witness.

(Last question read.)

A. Well, I will continue in connection with that same answer. Please read the answer so far given.

(Last answer read.)

A. I think that is as fully as I can answer that.

Q. How?

A. I say, I think that is as intelligent as I can make my answer to that question.

Q. Then when you say that she was seaworthy, your statement was based merely upon an assumption?

A. Partially upon reports made to me by competent men whose business it was to examine and make those reports; in fact, largely on such reports do I base that statement.

Q. You are not a master mariner?

A. No, sir.

Q. Not a marine engineer?

A. No, sir.

Q. Do you hold any license of any kind at all with respect to the navigation of a vessel?

A. No, sir.

Q. Now, you said that you made or that the inspectors made—which was it?—a casual examination of the ballast tanks.

A. No; I went on board with the inspectors, who made a minute, lengthy, extensive inspection, but I only made a casual inspection at that time.

Q. How long were the inspectors on board?

A. I couldn't say.

Q. Approximately?

A. I haven't the slightest idea.

Q. Did you go on board when they went aboard, or did you find them on board?

A. I am under the impression that they were on board working when I went on.

Q. Have you any idea of about how long they were on board before you went on the vessel?



A. Well, the only way I could form any opinion as to how long they were there was by the fact that they turned in to me a written report covering the whole situation, and I presume it took some time to do that.

Q. What time?

A. Well, I should say, in an offhand way, that it would take three or four hours to make the inspection above deck, that is, I mean without inspecting the boilers and engines.

Q. To inspect her above deck?

A. Yes, to make a thorough inspection, leaving out the boilers and engines. That would take in her tanks and deck fittings.

Q. How long were you aboard with the inspectors themselves?

A. I really couldn't make an intelligent answer to that. I don't know how long.

Q. Did you go with them from thing to thing and from place to place during the course of the examination while you were aboard?

A. I spent some time with them, yes. I made the trip from one place to another on board the steamer.

Q. Did you go with them down to inspect the ballast tanks?

A. Yes, I remember distinctly that I went down with them when they were looking over the ballast tanks—or, that is, I was in that part of the ship where the  
374 ballast tanks were located while they were there.

Q. What part of the ship is that?

A. That is partly between deck, and, if I remember correctly, part of the ballast tanks are in what you would call the lower hold.

Q. Now you are speaking of the tank between decks, and I have been asking about the ballast tanks. That

tank between decks, is that the tank you refer to as containing about a ton of water for the crew?

A. That is one of them, yes, sir.

Q. Now, the question is, did you go with the inspectors for the purpose, on their part or your part, of examining the water ballast tanks?

A. Not all over the ship.

Q. Did you go with them while any of the water ballast tanks were examined?

A. Yes, sir, I was with them when they were examining some tanks?.

Q. What ones?

A. I couldn't say what tanks.

Q. What did they do to make their examination? How was their examination made?

A. They were measuring the depth of the water, and, if I remember correctly, they had the pumps going pumping water into these tanks.

375 Q. Now, you say if you remember correctly. Do you remember, as a matter of fact, whether they did or did not?

A. Yes, they had pumps going, pumping water into these tanks.

Q. Into which tanks?

A. Into the ballast tanks.

Q. Into which of the ballast tanks?

A. I presume in all of them, but I am not positive of that fact.

Q. You were personally on board ship and with them in this inspection they were conducting for how long a period of time—you personally?

A. I gave that information in answer to a previous question, that I didn't remember how long.

Q. You have no idea?

A. No, I couldn't say.

Q. Did you leave them on board the vessel still inspecting?

A. I don't remember that.

Q. Now I understand you to say that when this vessel was at New Orleans, prior to leaving for Port Limon to make the trip from Port Limon, that she started on on the 29th of November, that you were advised that lumber was taken aboard for the purpose of putting up cattle fittings?

A. I stated that I had indirect information that lumber had gone aboard for the purpose of putting in cattle fittings.

376 Q. And that that lumber had gone aboard of her while she was lying at New Orleans previous to going down to Port Limon to take on this cattle for Armour & Company?

A. While she was in New Orleans.

Q. Previous to that trip that she undertook to transport cattle for Armour & Company?

A. Yes, sir.

Q. Who did you get that information from?

A. I am not quite sure about that.

Q. How long before the "Fort Morgan" left New Orleans had you received that information?

A. I don't remember how long.

Q. Did you wire to the master of the vessel or send any advice to the master of the vessel protesting against the putting up of cattle fittings?

A. No, sir.

Q. Did you send him any information at any time at all, not to to permit cattle-fittings to be set up?

A. I did not.

Q. Did you at any time advise the master of the "Fort Morgan" not to permit the transportation of cattle?

A. I did not.

Q. Nor livestock of any kind?

A. I did not.

Q. Who was the master of the "Fort Morgan" employed by?

A. He was employed by the owners of the "Fort Morgan."

Q. Which might be called, indifferently,  
377 either the Fort Morgan Steamship Company of Norway, or, just as well, the Gulf Coast Plantation Company?

A. Yes, sir.

Q. Did you receive reports from the master from trip to trip as to what they were doing?

A. I had knowledge of what they were doing.

Q. Did you get it from the master?

A. Well, our office kept informed regarding what they were doing.

Q. And your office was where?

A. In New Orleans.

Q. Now, this information that you got concerning the cattle fittings that were put aboard the steamship "Fort Morgan", did that information come to you from your office in New Orleans?

A. As I stated before, I am not able to say at this time just where I got that general information or impression.

Q. What force did you have at the New Orleans office?

A. We had a bookkeeper and a stenographer.

Q. They kept in touch with the master, did they?

A. Yes, sir.

Q. And then they in turn advised you of what was going on?

A. Yes, sir.

Q. Now, as a matter of fact, the putting in of cattle pens and fittings, those are merely temporary fixtures, are they not, put in and taken down at will without any alteration in the ship itself?

A. Yes.

Q. In other words, the cattle pens are facilities of just such a nature as would be required as dunnage of certain character or description in carrying other cargoes?

A. Along that line.

Q. In other words, it is done for the protection and preservation of the cargo and of the ship?

A. I believe there is a prescribed rule and regulation by the Government in regard to placing cattle fittings in a steamer.

Q. Or do you mean prescribed regulations that must be complied with for the purpose of importing cattle from Costa Rica?

A. Well, that rule would apply only to export.

Q. The rule you mention about the placing of cattle fittings, the exporting of them from the United States?

A. Yes.

Q. But in this case of the steamship "Fort Morgan" you were importing them. Now since the happening of the loss of cattle of Armor & Company's concerned in this suit was the steamship "Fort Morgan" or the stock in the Fort Morgan Steamship Company sold to other parties?

A. It was.

Q. And the persons purchasing the stock or the ship—which was it?

A. The stock.

Q. Were they advised by you of the pendency of the claim arising out of the loss of Armour & Company's cattle?

A. No claim in any definite form had been asserted at that time.

Q. That is, in a specific amount?

A. There was a question at that time as to whether the Central American Cattle Company and Armour would not—in fact, it was generally understood that they would settle it, and our company would not be involved at all.

Q. Is it not a fact that the person or persons purchasing the stock so as to acquire the ownership of the steamship "Fort Morgan" purchased it with knowledge of the fact that there had been a heavy loss of cattle belonging to Armour & Company on the "Fort Morgan"?

A. I rather think that they knew about the accident and the loss of cattle.

Q. Don't you know, as a matter of fact, that they did know it before they made the purchase?

A. No, I couldn't say that positively, but I am reasonably sure that they did, because it was generally known in steamship circles.

Q. Well, now, I have put the question to you before the purchase of it. Did they know it at the time they purchased the stock, that this loss had been sustained by Armour & Company on account of the matters discussed here with respect to cattle aboard?

A. Well, now, since thinking the matter over, I rather doubt whether they knew it all or not, because I don't believe they would have made the deal if they had known it. That is my answer after thinking the matter over a little further.

Q. As a matter of fact they acquired the possession of the stock in the company just as you people had it?

A. Yes, sir.

Q. With the same company continuing along?

A. Yes, sir.

Q. And just simply a transfer of the stock?

A. Yes, sir.

Q. So that they occupied identically the same position that you and your associates occupied before the sale was made?

A. Yes, sir.

Q. They understood, of course, that they  
381 were acquiring your rights, whatever they were?

A. Well, I couldn't say just what they understood. They bought the stock and had mighty good attorneys handling their side of the transaction.

Q. You say they did?

A. Yes, sir.

Q. And in buying that stock they bought it without any reservations or any conditions about any contingencies or claims that might be asserted against the "Fort Morgan"?

A. Yes, sir.

Q. Did they require any bond of you or security from you with regard to any claims that might be asserted against that vessel?

A. No, sir. I might state this, Mr. Grace: They made me promise to pay the debts of the company.

Q. Then they accepted your personal security or the security of yourself and associates in that promise?

A. Yes, sir.

Mr. Grace:

That is all.

Mr. Flint:

That is all.

(The taking of depositions herein at Los Angeles, California, was thereupon adjourned.)

382 State of California, ss.  
County of Los Angeles.

I, John P. Doyle, Notary Public in and for said county and state, do hereby certify that heretofore, to-wit, on the 17th and 18th days of September, 1919, personally appeared before me, at the offices of Messrs. Flint & MacKay, in the city of Los Angeles, county of Los Angeles, state of California, Thomas Johannasen and Robert T. Burge, witnesses produced on behalf of the Fort Morgan Steamship Company, Ltd., claimant, respondent and petitioner in a certain cause now pending and undetermined in the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, wherein Armour & Company is Libelant and the steamship "Fort Morgan" is Defendant.

I further certify that said witnesses were by me first duly sworn to testify the truth, the whole truth and nothing but the truth in the cause aforesaid; that the testimony then given by them was by me reduced to writing, in the presence of said witnesses, by means of shorthand, and afterwards transcribed upon a typewriter, and that the foregoing is a true and correct transcript of the testimony so given by them as aforesaid.

I further certify that I am not in any way related to any of the parties to this suit, nor to any of the counsel appearing therein, nor am I in any way interested in the outcome thereof.

383      In witness whereof I have hereunto set my  
hand and seal this 20th day of September, 1919.  
(Signed)                      JOHN P. DOYLE,  
(Seal)                          Notary Public, Los Angeles  
County, California.



384 EXHIBIT B-5—LETTER FROM LLOYD'S  
AGENT, COSTA RICA, DATED 12/3/17.

Filed February 1, 1922.

Omitted from the Printed Record, being heretofore  
copied at page 324.

\* \* \* \* \*

387 Note:

Exhibit marked Armour & Company D-4, being a  
sketch of a Steamship, transmitted in the original to the  
U. S. Circuit Court of Appeals, as per stipulation of  
counsel.

388 TESTIMONY FOR RESPONDENTS.

Filed February 1, 1922.

United States District Court, Eastern District of  
Louisiana.

Armour & Co.,

vs.

No. 15,811.

Steamship "Fort Morgan" Central American Cattle Co.,  
Inc., called in by Claimants.

Testimony taken in the above entitled and numbered  
cause on the 26th day of February, 1920, before Reginald  
H. Carter, Commissioner, at New Orleans, La., on be-  
half of Respondent.

Appearances:

John D. Grace, Es., Proctor for Libelant;

Denegre, Leovy & Chafee (Mr. Leovy), Proctors for Respondent;

Terriberry, Rice & Young (Mr. Young) Proctors for the Central American Cattle Co., Inc.

389           CAPTAIN OLAF H. OLSEN, sworn and examined as a witness on behalf of the Respondent, testified as follows:

Direct Examination.

By Mr. Leovy:

Q. What is your name?

A. Captain Olaf H. Olsen.

Q. What is your occupation?

A. I am a ship surveyor.

Q. And have been for how long?

A. I have been a ship surveyor for seventeen years.

Q. Representing the Norwegian Veritas?

A. Yes, sir.

Q. At Mobile and New Orleans?

A. Yes, sir.

Q. Are you at all acquainted with the steamship Fort Morgan?

A. Yes, sir.

Q. How long?

A. I have been acquainted with the steamship Fort Morgan since 1904.

Q. Is she classed in the Norwegian Veritas?

A. She is classed in the Norwegian Veritas.

Q. That classification requires surveys by you from time to time?

A. It requires classification to carry out Norwegian rules, of course.

Q. What condition would that require her  
390 to be in?

A. Of course she is due the different surveys for upkeep class, and she is also due for surveys in case she has been aground or damaged in any kind of way.

Q. On December 14, 1917, did you make a survey of that vessel?

A. Yes, sir.

Q. I hand you a document. Is this a copy of it?

(Document in question handed to witness. Witness examines same.)

A. Yes, sir.

Q. Will you state, at that time that you made that survey, whether the ballast tanks on the Fort Morgan were examined and tested, and what condition they were found in?

A. According to my report of ballast tanks, they were full and showed no leaks, they were examined as far as we could get at them.

Q. Did you have occasion afterwards to make a survey of that ship some months afterwards?

A. I made a survey of that ship on February 2nd, 1918, after the ship had been aground at Trinidad, Cuba, on January 18th.

Q. What was the condition of the tanks at that time?

A. The condition of the tanks was, they were tight and they were tested at that time with water pressure.

Q. Did you ever know of any repairs being  
391 made to those tanks, or did you find indications of any repairs at that time?

A. Not during the interval from December 14 to February 2, not until April 28, 1918.

Q. What did you find then?

A. At that time we examined the tanks and scraped them and cleaned them, and while cleaning the No. 3 tank, we found the tank band plate, we found a corrosion hole in the tank band plate, and that was patched up properly, and then the tank had been tested.

Q. Was that such as to cause a leak at that time?

A. There was no leak before we found this corrosion. When all the rust and foreign matters were taken away, then the leak showed up. It had not proven a leak before.

Q. Generally, with regard to your survey of the Fort Morgan, can you state whether in your survey of December 14, you found her in good condition or bad condition, or did you find anything the matter with her?

A. You mean on December 14?

Q. Yes.

A. On December 14 I didn't find anything that was in any bad condition.

Q. Will you look at a plan of this vessel, which I show you in the Los Angeles testimony, between pages 103 and 104, and state whether that substantially represents the constructions of the Fort Morgan and tanks. (Document in question shown to witness. Witness examines same.)

A. This is only a rough sketch of something that looks like the ship, but I can't say that it represents the construction of the Fort Morgan exactly.

Q. In what way do you find any differences? What I am asking you is not whether it is drawn to a scale but simply whether it correctly represents the position of the different parts of the ship that are noted on it?

A. With regard to the holds and the different divisions of the ship, it is about correct.

Q. And the decks?

A. The decks are correct, in this way, that this fruit deck here that is mentioned, fruit decks, they are not stationary decks in the ship, they are only removable decks for cargo.

Q. But that is about their position?

A. That is about, as far as I can see, their position in the ship.

Q. And with regard to the tanks?

A. The tanks, with regard to the double bottom, it is all right.

Q. And of the peak tanks, is that location correctly indicated?

A. It is about correctly indicated, yes, sir.

393 Q. Will you look at these tanks, indicated as tanks on there, and state whether any of them are ballast tanks, and if so, which?

A. No. 1, No. 2 and No. 3 are ballast tanks.

Q. Where are they located?

A. No. 1 and No. 2 are located in the forward hold, between the forepeak tank and the engine or boiler room. No. 3 is located from the engine room to a well in the after hold.

Q. There are two tanks indicated in the bow and stern of the vessel. What are those called?

A. You mean No. 1 and No. 2?

Q. No.

A. You mean the forepeak tank?

Q. Yes, and what is the other one?

A. The after peak.

Q. In the language and terms used in nautical circles in describing vessels, are such tanks known as ballast tanks?

A. You very often find that the fore peak tank is not a ballast tank, or rather, in most of the cases, they

are not ballast tanks; they are there for certain purposes, not absolutely for ballast purposes.

Q. In that ship, what would you say as to that ship, the Fort Morgan?

A. The afterpeak in that ship is mostly  
394 there for fresh water purposes.

Q. And the fore peak tank?

Objection: Mr. Grace:

I object to the conclusion of the witness.

A. The forepeak is merely for collision purposes.

Q. What do you mean by that, "for collision purposes"?

A. Merely for collision purpose, leakage and things like that.

Q. With regard to the condition or construction of those ballast tanks, were they or not such as could be filled with sea water when the ship was at sea?

Objection: Mr. Grace:

Objected to on the ground that the question is vague and indefinite with respect to time.

A. Yes, sir.

Q. How could they be filled?

A. They could be filled from the engine room by two valves.

Q. Into what do those valves open, where would the water come from?

A. The water comes direct from the outside, through that valve, running through pipes into the water ballast tanks again.

Q. Will you examine the deck which is described as the fruit deck, and point out just where it was.

395 I think it is called the fruit deck on that plan.

A. The fruit deck is indicated here as the lower deck in the forward hold and intermediate deck in the second hold.

Q. About how high were those above the bottom of the ship?

A. They were about seven feet, six feet—I don't know exactly.

Q. Captain, what would be the effect on the stability of the ship of constructing such decks and filling them with such loads as those of cattle?

A. A ship like the Fort Morgan, I don't think that she is built for the purpose of carrying that kind of cargo, for instance, cattle. She is narrow and deep.

Q. And those fruit decks would be the same distance above the bottom, of course?

A. There would be, as I stated, about six or seven feet above the tank tops.

Q. What would be the effect of loading them with cattle in place of fruit, on the stability of the ship?

A. The ship will be crank and apt to heel over.

Q. Was there any room in the hold of the ship, aside from the deck, to confine a large quantity of cattle, aside from those various decks?

A. You mean where they could put cattle?

Q. Yes.

A. No, sir, not that I know of.

Q. If 420 head of cattle were loaded on board, where must they have been put?

A. The only place they could be put was in  
396 No. 1 and No. 2 hold, forward and aft hold.

Q. You mean in the hold or on the decks?

A. From the tank top up under the upper deck.

Q. On the decks or in the bottom of the boat?

A. They couldn't get in the bottom of the boat, because there is no place for them. They must have been put in the decks, some of them, I suppose were put down on the bottom of the boat.

Q. What is the comparative effect of a cargo of cattle on the stability of the ship, as compared with a cargo of fruit?

A. That is a very difficult question to answer on account of it just depends on the boat.

Q. I mean, does it have more effect to make a boat crank, or less effect?

A. It has absolutely, according to my opinion, more effect to make the ship crank, on account you can't get cattle enough down on the bottom of the boat, and it loses some of its stability. The heaviest cargo of cattle will always lie on the upper deck and fruit you can fill up down to the bottom and have it equalized all over.

Q. Will you explain whether or not there was any place on that ship for the carriage of coal?

A. The main bunker on the Fort Morgan, as far as I remember, is on her main deck between the upper  
397 deck and the main deck, and then she had a cross bunker from the main deck down to the bottom.

Q. Why do you call that a cross bunker; does it run across the ship?

A. Yes, sir; it runs across the ship. It is a space cutting across the ship provided for the bunker.

Q. Where is the shelter deck?

A. The Fort Morgan has no shelter deck, but what we call the shelter deck is the upper deck, that is, the main deck in the ship, main constructive deck, the upper one is what we call the shelter deck.

Q. The bunker would then be under the shelter deck?



A. It is part of the hurricane deck.

Q. That is the regular place for the carriage of coal on that ship?

A. That is provided for coal.

Q. Is that the place intended as bunker in that sketch (counsel indicating on the sketch)?

A. Yes, sir; this is the place here (witness indicating on sketch).

Q. Captain, in the time you have been on the Fort Morgan, did she have any trouble with her cargo at all?

A. No, sir; I have never had any opportunity to examine her for any trouble in that connection; she has always carried fruit at the time I knew her, and she is a specially built fruit ship.

398 Offer: Mr. Leovy:

I desire to offer in evidence a copy of the survey and mark it "Olsen-1."

Objection: Mr. Grace:

Objected to on the ground that it is irrelevant, immaterial, incompetent and inadmissible.

#### Cross-Examination.

By Mr. Grace:

Q. Have you ever gone to sea in the Fort Morgan as an officer thereof?

A. No, sir.

Q. Have you ever been aboard of her on any sea voyage at all?

A. No, sir.

Q. At such times as you made your inspection or inspections of the Fort Morgan, where would she be?

A. She was lying at the Stuyvesant Dock at the time of inspection on December 14.

Q. Did you make any other inspection besides the one you say you made on December 14?

A. I made one on February 2nd.

Q. And where was she lying then?

A. She was lying, as far as I remember, at Stuyvesant Dock. I don't remember that exactly, though.

Q. And that dock, the Stuyvesant Dock, that is the dock here in front of the City of New Orleans?

A. Yes, sir.

399 Q. So that the vessel was moored to her dock in the Mississippi River?

A. Yes, sir.

Q. At the time you made the examination of the Fort Morgan, either in September or February, was she loaded?

A. No, sir; she was light, I mean to say, there was no cargo on her.

Q. At the time that you made the examination, was it because she was then due for classification?

A. No, sir, not at all.

Q. What was the reason or purpose of making that examination then, say in December?

A. The reason was to obtain a seaworthiness certificate.

Q. Why was it that it became necessary to secure a seaworthiness certificate?

A. Well, I presume it was on account of having this accident, to find out whether the ship was damaged in any way or not, after having heeled over about 38 degrees, as was reported to me.

Q. Just how many degrees she had heeled over, you don't know of your own knowledge?

A. No, sir.

Q. And when you made that examination, what was the nature of the examination you made with respect to her water tanks?

A. The nature of an examination like that  
400 would be, to fill the tanks, open the valves to the outside, so that the water could freely run in, and have a pressure on the tank to the water ballast line.

Q. That is the usual way?

A. Yes, sir.

Q. That was not done in December, was it?

A. That was reported to me from the chief engineer and the mate, that the tanks were filled up to the water ballast line at that time.

Q. As a matter of fact, you did not personally inspect the tank to see that it was filled, did you?

A. I couldn't get in the tanks when they were full.

Q. I know you couldn't, but you are speaking of what you were told by the chief engineer and mate?

A. They were inspected and found to be full.

Q. No, but did you, personally, of your own knowledge, of your own personal knowledge, ascertain that the tanks were filled, or did you depend on the report of the engineer and mate?

A. I had a man going around to sound the tanks, and he reported that they were full.

Q. So that you personally did not do the sounding?

A. I don't personally attend to the sounding.

Q. So that somebody made some sounding and reported to you that they were full, and the mate  
401 and the engineer you say, reported to you that they were full?

A. As far as I remember, we were all in the cabin together with the captain and that was reported to me.

Q. And you took that report as true and acted on it?

A. Yes, sir.

Q. So that, of your own knowledge, you don't know really what water was in there?

A. I couldn't swear what was in there exactly, but they reported that they were full.

Q. In February, you made another inspection of those tanks?

A. Yes, sir.

Q. What was the purpose and object of that inspection?

A. To find out whether she had sustained any damage after grounding, that was with regard to the ship being leaky or not.

Q. She grounded where?

A. She grounded at Trinidad, Cuba, on January 18.

Q. And that examination then was for the purpose of ascertaining whether she had sustained any damage there?

A. Yes, sir, and whether she was water tight.

Q. It was not a classification examination then either?

A. No, sir.

Q. When that examination was made, if I recall right, you said there was some scraping or cleaning up of some of the ballast tanks that was done?

A. Not at that time; that was at a later time, on April 28.

402 Q. You didn't examine the water tanks then in February?

A. The water tanks were examined, and they said they were full again with water to the ballast line, and tested and found all right.

Q. You personally, of course, did not attend to the filling of the tanks; that was done by the engineer?

A. Yes, sir.

Q. You personally didn't test the tanks either?

A. No, except that I examined the tanks after they were filled.

Q. Just how much water was put in them, you personally don't know, except from the reports made to you?

A. Not except from the report that they were sounded and found the water was in there.

Q. So that you didn't fill the tanks, you didn't go there to see them filled, and you didn't sound the tanks to see what water was in there?

A. I saw the tanks filled in that regard that I saw the man sounding the tank, and I saw that the sounding rod and line was wet, which indicated water in the sounding pipes.

Q. The sounding, though, was done by some one other than yourself?

A. It was done by another man than me.

Q. And then he reported to you just what he found there?

A. Yes, sir.

Q. Naturally you depended on them to tell  
403 you?

A. Yes, sir, and I also saw that they were at the sounding pipes and sounding them, and I also saw the rod and line, that it was wet.

Q. So that you knew there was some water—

A. I knew there was water in the sounding pipes; I always convinced myself that way; I see on the rod or the line that is wet. If the man that sounds don't find any water in the tank, he always comes and reports that to me, and that was done in this case too.

By Mr. Leovy:

Q. Was that done in December, too?

A. Yes, sir; that was done in December too.

By Mr. Grace:

Q. You don't know, as a matter of fact, whether any pressure was put on that water in the tanks, do you, of your own knowledge?

A. I don't know of any pressure except the outside pressure which is caused by the valve being open direct to the tank.

Q. And the degree of that pressure, or the amount of that pressure, would depend on the amount that the valve was opened?

A. No, sir, it will not depend on the valve, how much it is open, because it is bound to run out in the sound pipe up to the ballast line, or outside water line, and that gives you the pressure of the tank.

Q. Then by pressure you mean just simply  
404 the weight of the water itself in the tank?

A. Yes, sir.

Q. You don't mean by any external pressure applied to them?

A. No, sir.

Q. Was it in April when the tanks were cleaned?

A. Yes, sir.

Q. Then in the cleaning of those tanks and cutting away the scale and corrosion adhering on it, then there were leaks found in them?

A. Yes, sir; there was one leak found between the afterpeak tank and the No. 3 tank, just leading into the valve, between the after peak tank and the No. 3.

Q. Just what, if anything, any of the officers may have done, or anyone from shore may have done, to

remedy any leaks or anything of that sort, that, of course, you don't know.

A. No, sir.

Q. Do you know whether there was any ballast carried by the Fort Morgan, independent of water ballast?

A. No, sir, I never knew of any other ballast in her.

Q. Where that character of cargo is carried that, because of its nature, would mean a raising of the boat for that cargo, how is that compensated for in ships?

A. That, of course, depends very much upon the ship's construction. In a ship like the Fort Morgan, a cargo like that ought not to be put as high as, 405 for instance, on the upper deck there, and without having any extra ballast put in the lower holds, that can only be done by having some heavy substance laid down outside water ballast.

Q. So that, in speaking of the conditions which would produce crankiness in the Fort Morgan, as distinguished when she is carry fruit, and on another occasion when she is carrying cattle, you were referring merely to her water ballast conditions at that time?

A. Yes, sir.

Q. But she could carry cattle in those places, and carry just as safely as she could carry fruit, if she would put the necessary ballast down in her hold?

A. Yes, sir, I believe so.

Q. Now speaking of the forepeak tank, just what purpose it is used for on the Fort Morgan, you don't know?

A. No, sir, I don't know any other purpose than as on other ships; it is mostly there for collision purposes.

Q. That is, in the event of her getting a head on collision?

A. Yes, sir, and leakage, anything like that.

Q. Have you any idea what amount of ballast No. 1 ballast tank would hold in tons?

A. The lay out of it is No. 1 to No. 2, both of them should be able to contain 99 tons together.

Q. Now the No. 1 and No. 2, you say, combined, should hold in water of how many tons?

406 A. About 99 tons, that is her constructed water ballast.

Q. Those are permanent water ballast tanks?

A. That is laid out from construction.

Q. And those two tanks are located where, No. 1 and No. 2?

A. They are located in the forward hold, between the forepeak bulkhead and the bulkhead in the after hold, which is the forward bulkhead of the cross bunker.

Q. Then it would extend, so that we can try and get this diagram that was offered in evidence in the record between pages 103 and 104, then it would extend from the forepeak tank to the forward bulkhead of the bunker?

A. Yes, sir.

Q. And the No. 3 tank should hold how many tons of water?

A. According to the construction plan, it is 46 tons.

Q. This construction plan that you are speaking of, where did you get the figures?

A. That is my given figures from our head office.

Q. That is, the head office of the Norwegian Veritas?

A. Yes, sir.

Q. And those plans are secured from the builder or owner of the vessel?

A. Yes, sir; that is to say, those plans must be approved of by the Norwegian Veritas before they can get classification in the institution.



Q. The afterpeak tank, how many tons of  
407 water should that hold?

A. That is given out to hold seven tons.

Q. It couldn't hold any more than that?

A. Not as far as I know, and I have examined it many times myself, and it seems very small to me, it couldn't hold very much more than seven tons.

Q. And her approved plans would indicate it is a seven ton tank?

A. Yes, sir; that is about it, I would judge myself it is about that.

Q. That forepeak tank, suppose it was filled with water, how many tons of water would that hold?

A. It is supposed to hold twenty-two tons.

Q. Now speaking of the tonnage of the water, do you compute it on the basis of salt or fresh water?

A. On the basis of salt water, I will say, the weight of the water is taken mostly by the weight of the water in the Thames River in England; that is the foundation of the measure of the water.

Q. At different points in that river; you get different degrees of saltiness, do you not?

A. It is taken where the water is dirty and brackish.

By Mr. Leovy:

Q. With regard to the ships that are insured in the Norwegian Veritas, are you consulted about those?

A. In the Norwegian Veritas, you mean?

408 Q. Yes, such as this boat?

A. Yes, sir.

Q. Are you consulted about those repairs?

A. If it is any repairs that have any influence on the structural part of the ship, or the safety of the ship, they must always notify me, so that I can see that the

repairs are done in order that the ship is fully seaworthy again.

Q. That would include repairs to tanks?

A. Yes, sir.

Q. And you say you know of no repairs being made to the tanks?

A. Not between December 14 and April 28, when No. 3 tank was patched.

Q. On April 28, you made a sufficient examination to discover this defect in No. 3 tank?

A. During that time we cleaned the tanks and re-cemented them and fixed them and found that corrosion then.

Q. Suppose that a leak in the tank that would have been sufficient to have any effect on the stability of the ship in an hour or two's use of the ship, that would have been a pretty serious leak, would it not?

Objection: Mr. Grace:

I object to suppositions.

A. Yes, sir.

Q. Would it or not have been—

409 A. I didn't exactly understand what you said.

Q. I say, if a leak in a tank were big enough to affect the stability of the ship in the course of an hour or two, would it or not be a big leak?

A. It ought to be kind of a big leak.

Q. If a leak of that kind had existed and a patch been put on, would you have found it in April, would you have found the patch in April when you examined the tank?

A. I would have found a patch if it had been there, yes.

Q. Did you find any patch there?

A. No, sir; I don't know of any patch being there.

Q. You had previously examined the tanks and reported them as in good condition?

A. Yes, sir, if they were accessible.

Q. But if you had found patches had been put on them, it would have attracted your attention?

A. Yes, sir, and I would have made an inquiry about it, why it had been put on.

Q. You found none yourself?

A. I don't know of any. Of course I didn't uncover all of the tanks.

Q. Why did you uncover No. 3 tank?

A. We didn't uncover No. 3 tank, that is to say, we didn't remove the ceiling of it, but we cleaned the bilges and the valves so that we could get at the  
410 strainers and things like that, and at the same time we found that rust back there which we scaled and removed.

Q. What I wish to ask you is whether you have noticed any patches on the other tanks.

A. I don't know of any patches, I don't know of any patch on No. 3 tank on the Fort Morgan.

Q. Or any of the other tanks?

Objection: Mr. Grace:

Objected to as vague and indefinite.

A. Not that I know of.

Q. Now you say, as I understood you, that the process of examination of these tanks was for the man to bring you a rod or rope to show you that it was wet; is that right?

Objection: Mr. Grace:

Objected to.

A. Of the sounding, you mean?

Objection: Mr. Grace:

Objected to on the ground that the witness has stated that in the event of sounding and finding no water, that he would bring a rod or line to show that it was not wet.

Q. Did he bring it to you when it was wet?

A. It is always shown to me when it is wet or dry, to prove whether there is water in it.

Q. Those rods have measures on them to indicate the height of the water?

A. The iron rod is as a rule about two feet high, and indicated per inch.

By Mr. Grace:

Q. This valve that you spoke of around the No. 3 tank, that is the one where you found the leak?

A. It is no valve; it is a tank end.

Q. And you only found that leak because you were cleaning up the valves around there?

A. Cleaning up the valves at the after end of the tank.

Q. Then this leak was discovered when you came to clean the valve that was in the after end of this tank?

A. We cleaned that after tank end and the valve, scaled it and cleaned it, and during that time we found the corrosion.

Q. And I understand that the examination that was being made then was for the purpose of uncovering the

different valves and examining the different valves to see they were in order?

A. That was only for general cleaning. The ship was laid up in Mobile for certain repairs at that time. She had been laying there about a month for putting in a thrust shaft, and of course the sailors on board were doing all kinds of work, and any necessary work, and that was the cleaning the bilges and the valves  
412 out, and during the cleaning of them they found those things. Of course they always report it and it will be attended to afterwards.

Q. These tanks themselves, they are covered with woodwork, ceiling?

A. The ballast tanks are covered with wood ceiling, about two and a half inches thick, as a rule.

Q. You didn't have them uncovered?

A. Not at the time of the sounding.

Q. You never had them uncovered at any of these times you speak of?

A. No, sir, we never have those uncovered except during the reclassification of the ship and after heavy damages, or things like that.

Q. By uncovering them, taking off this ceiling, that would expose the whole tank, would it not?

A. Yes, sir; the whole top tank.

Q. And the whole tanks were not exposed to you at any time?

A. No, but if any leaks had shown up, you see, the water will run underneath the ceiling of the tank out into the bilges. You don't need to uncover the tank tops to examine the tanks, on account you will find the water running out from underneath the ceiling, and then, after you find the water running out from the ceiling, we try and locate the leak.

413 By Mr. Leovy:

Q. Were these tanks uncovered in Mobile?

A. Not on the 28th of April.

Q. They were afterwards?

A. No, sir; because the ship left for up north at that time and I haven't seen her since.

Q. When you found that defect in No. 3, where were you?

A. That has nothing to do with the tank top, because that is in the after end.

Q. The counsel has continually referred to that as a leak. Did I understand you to say there was any such condition that it would leak at that time?

A. It was not leaking before, I didn't find the leak before it had been scaled, it had been covered with a whole lot of dirt and scale and foreign matter which had accumulated around there.

Q. What I mean to say is, the condition in which it was, had it been leaking?

A. No, sir, not that I know of.

Q. Would it leak?

A. No, sir; not before the dirt and everything had been removed.

Q. It wouldn't leak until after these scales were removed?

A. No, sir.

By Mr. Grace:

Q. The scale and the dirt—

A. Yes, sir; they covered it up.

Q. —they acted as a sort of paint over the  
414 plate?

A. Yes, sir.

By Mr. Leovy:

Q. Was that a serious leak, would it amount to anything?

A. It was a very small leak.

Q. Would it affect the stability of the ship in any way?

A. No, sir, because that leak would have run into the valve and not to any of the bilges, it goes direct down in the bottom of the ship. It would have gotten serious if it came over the tank top, of course.

VICTOR LEOVY, being duly sworn as a witness on behalf of the Respondent, testified as follows:

I am obliged to say that I know of no other deposition to be taken on behalf of Respondent, for the reason that, in spite of investigations conducted through counsel in New York and Mobile, ever since the parties were made complete to the case and it was at issue, I have been unable to locate any of the officers of the ship, and it is reported that their whereabouts are unknown. Of course we reserve whatever rights may be given by the admiralty practice as to the taking of evidence in rebuttal or otherwise.

415

State of Louisiana.  
Port of New Orleans.

Marine Surveyor's Office #308 Title Guarantee Building.

The undersigned did at the request of W. J. Hardin, Lloyd's and Underwriter's Agent, and Owners' Repre-

sentative, make an examination of the Norwegian S/S "Fort Morgan" of 1119 gross tons, while vessel lay afloat at Stuyvesant Dock Wharf 5, on Dec. 13th, 1917, to ascertain if vessel had received any damage on account of leaving Port Limon on Nov. 29th, about 6:00 P. M. with 420 head of Cattle on board, and returning and coming to anchor at Port Limon about 9:00 P. M. on Nov. 29th.

For further particulars see Log Book and Master's Protest.

It is stated that while vessel lay at the Wharf at Port Limon at 6:00 P. M. on Nov. 29th, 1917, with 420 head of Cattle on board that vessel had a list to Port of 7 degrees. After letting go moorings vessel listed over to 13 degrees, and when vessel got outside Port Limon in a heavy swell, vessel listed to Port 38 degrees, Master considering the danger returned to Port Limon and anchored about 9:00 P. M. on Nov. 29th, 1917, lifted anchor and came alongside of wharf at about 12:00 P. M. Nov. 29th, commenced discharging cattle that were alive. 212 were found dead and dying, vessel left Port Limon Nov. 30th, 1917, about 5:00 P. M. and proceeded to sea to throw overboard the carcasses of 212 dead cattle. Returned back to Port Limon on Saturday, Dec. 1st, at 7:30 A. M. and anchored awaiting orders.

On Dec. 5th, 1917, about 1:00 P. M., came alongside wharf to discharge hay and fumigate, and left for New Orleans, on Dec. 5th, 1917, at 9:30 P. M. in ballast, and arrived at New Orleans and anchored at the Point on Dec. 10th, at midnight.

It is stated that when the vessel was alongside the Wharf before leaving Port Limon, that all tanks double bottom were filled, as a certain amount of the water had been used on the way from New Orleans where the



tanks were previously filled from the Mississippi River, and the amount taken to fill up these tanks at Port Limon is stated to be 60 tons.

Upon examination of the vessel we find that vessel has no apparent damage.

Given under our hand this fourteenth day of December, 1917.

(Signed) A. E. WILSON,  
Surveyor Representing Lloyd's  
& Und. Agt.

(Signed) OLAF H. OLSEN,  
Surveyor Representing Owners.

416 NOTE OF EVIDENCE ON BEHALF OF  
CENTRAL AMERICAN CATTLE CO.

Filed Feb. 1, 1922.

United States District Court, Eastern District of  
Louisiana, New Orleans Division.

Armour and Company,  
vs. No .15,811, In Admiralty.  
Steamship "Fort Morgan."

Note of Evidence.

Respondent, Central-American Cattle Company, produces and files in evidence the following:

1. Charter party between Gulf Coast Plantation Company and the Central-American Cattle Company, Inc.

2. Affidavit of Edward J. Mitchell, marked for identification "Central-American Chicago 1."

3. Receipt dated November 29, 1917, signed by Edward James Mitchell, marked for identification "Central-American Chicago 2."

4. Letter dated December 5, 1917, to the Master of the Norwegian Steamship "Fort Morgan," marked for identification "Whilden 1."

5. Certified copy of protest made by O. R. Whilden before Stewart E. McMillan, American Consul, on December 6, 1917, and marked for identification "Whilden 2," together with documents referred to therein.

6. Protest of O. R. Whilden made before Stewart E. McMillan, American Consul, on December 1, 1917, marked for identification "Whilden 3" together with various documents referred to therein.

7. Testimony of O. R. Whilden.

(Signed) TERRIBERRY, RICE & YOUNG,  
Proctors for Respondent.

New Orleans, Jan. 24th, 1921.

417      TESTIMONY ON BEHALF OF CENTRAL-  
AMERICAN CATTLE COMPANY, INC.

**Filed Feb. 1, 1922.**

United States District Court, Eastern District of  
Louisiana.

Armour and Company,  
vs. No. 15,811.  
Steamship "Fort Morgan."

Testimony taken in the above entitled and numbered cause on behalf of Central American Cattle Co., Inc., before Reginald H. Carter, Commissioner, at the office of Terriberry, Rice & Young, on the 25th day of May, 1920.

**Appearances:**

**Messrs. Terriberry, Rice & Young (Mr. Young).**

For the Central American Cattle Co., Inc.

Messrs. John D. & A. M. Grace (Mr. John D. Grace),  
For Armour & Co.

**Messrs. Denegre, Leovy & Chaffe (Mr. Leovy).**

For the Steamship "Fort Morgan."

418      **Stipulation:**

It is hereby stipulated and agreed by and between counsel for the Fort Morgan Steamship Company, Mr. Victor Leovy, representing Denegre, Leovy & Chaffe, proctors; by counsel for the Central American Cattle Company, Incorporated, Mr. W. W. Young, representing Messrs. Terribery, Rice & Young, proctors; and by counsel for Armour & Company, Mr. John D.

Grace, representing Messrs. John D. and A. M. Grace, proctors; that this deposition may be taken down in shorthand and transcribed by the reporter, signing, sealing and certification to be waived, and that four carbon copies shall be made, one for each of the counsel represented in the case, and to be taxed as costs.

OSCAR R. WHILDEN, sworn and examined as a witness on behalf of the Central American Cattle Company, Incorporated, testified as follows:

\* Direct Examination.

By Mr. Young:

Q. What is your name?

A. Oscar R. Whilden.

Q. What is your business?

A. I am in the cattle business.

Q. You are connected with what company?

A. With the Central American Cattle Company, Incorporated.

Q. In what capacity?

419 A. President.

Q. How long have you been connected with the Central American Cattle Company as president?

A. Since February 1st, 1916.

Q. Were you at Port Limon in November, 1917?

A. Yes, sir.

Q. Did you represent the Central American Cattle Company, Incorporated, on a shipment of cattle that went forward on the steamship Fort Morgan?

A. I did.

Q. Were you present there when the cattle were loaded?

A. I was.

Q. You saw them after they were loaded?

A. I did.

Q. Were there any cattle loaded on the deck on that vessel?

A. There was.

Q. Were they properly loaded?

A. They were.

Q. How were they loaded on the deck?

A. They were loaded in pens, one pen on the starboard side and one pen on the port side, running fore and aft.

Q. Who had built those pens?

A. Those pens were constructed by the master of the vessel and Mr. Wilkinson, supercargo for Armour & Co., under their supervision.

Q. Where were they constructed—I mean  
420 what place?

A. At Port Limon, Costa Rica.

Q. Were they all built there, at Port Limon?

A. They were completed at Port Limon. The pens on the upper deck were completed at Port Limon. Some of the pens in the lower hold were begun at New Orleans.

Q. Were you present when those pens were put on the Fort Morgan at New Orleans?

A. No, sir.

Q. And they were built under whose supervision?

Objection: Mr. Leovy:

Objected to on the ground that the witness says he was not present, and that the testimony is manifestly hearsay.

Q. How did you come to employ the master of the Fort Morgan and Mr. Wilkinson, the supercargo, to build those fittings?

A. It was my purpose in employing those two men to supervise this work, to see and know that the owners of the vessel were satisfied with the construction of the pens, and also to know that Armour & Co. were satisfied with the pens by virtue of the fact that their supercargo was one of the supervisors of the construction work.

Q. You actually saw them superintend the work there at Port Limon of those fittings on the steamship Fort Morgan?

A. Yes, sir.

421 Q. You say you employed them; did you pay them for their services?

A. I paid Mr. Wilkinson \$50.00 for that service. He was supercargo for Armour & Co.

Objection: Mr. Grace:

Objected to on the ground that the work spoken of was work independent of his services as supercargo.

Q. Did you pay the master anything for any service he rendered in building those fittings?

A. I also paid the master \$50.00 for services in connection with the construction of pens.

Objection: Mr. Leovy:

Objected to on the ground that the duties of the master are stated in the charter, and that any payment made to him individually and any services rendered by him outside of his charter duties were in the course of employment by the witness and not by the Fort Morgan Steamship Company.

Q. How much experience have you had in the handling of cattle and shipping out of cattle, how many years?

A. Up to that time, I had four years previous experience.

Q. Did you see this vessel just previous to her leaving Port Limon?

A. I did.

Q. Did you consider the cattle properly loaded and the fittings all in good condition?

A. Yes, sir.

Q. Properly erected?

A. Yes, sir.

Q. How long after she left Port Limon, did she return?

A. About three hours and a half.

Q. How soon after her return did you see her?

A. Immediately.

Q. What was the condition of the fittings when the vessel returned?

A. As soon as we were able to get aboard of the vessel, we found that the fittings were intact, and that none of the fittings had given way.

Q. How soon after was that?

A. That was immediately upon the return of the vessel to Port Limon.

Q. Did you ever make a trip on the Fort Morgan previous to November, 1917?

A. I did; I shipped live stock on the Fort Morgan during the year 1915.

Q. Did you make a trip on the vessel at the time she carried your live stock?

A. I did, yes, sir; September 13, 1915; I shipped from Truxillo, Honduras, to Bocas Del Toro, via Port Limon,

137 mules and two horses, loaded on the deck  
 423 of the steamship Fort Morgan, all on deck; I  
 accompanied that shipment.

Q. That shipment was made safely, the stock arrived  
 in proper condition?

A. They did. I have a copy of the bill of lading  
 covering that shipment in my pocket, which I can of-  
 fer as substantial evidence.

Q. Did you speak to the master of the vessel imme-  
 diately after his return to Port Limon?

A. I did, yes, sir.

Q. What reason did he give for being forced to put  
 back to Port Limon?

Objection: Mr. Leovy:

Objected to on the ground that any statements by the  
 master were not binding upon the ship and are hearsay  
 and *res inter alios acta*, and, further, that the testimony  
 of the captain has already been taken, and that he lives  
 at a great distance, and that any claim or any state-  
 ment by him should have been alleged in the libel or  
 proved in advance in order to allow opportunity for con-  
 tradiction, and it is agreed that this same objection shall  
 be considered as made to all attempts to prove anything  
 that was said by the master.

A. He stated as his reason for returning to Port  
 Limon, that he considered the vessel too heavily listed,  
 that the ballast tanks were improperly filled,  
 424 and it was impossible for him to take the list  
 out of the vessel. Furthermore that he had  
 encountered heavy seas.

Q. I show you a letter dated December 5th, 1917,  
 addressed to the master of the Norwegian steamship Fort



Morgan, Port Limon, Costa Rica, signed Central American Cattle Company, Incorporated, by O. A. Whilden, President, in which it is stated, "Terms and conditions as stated above accepted for owners", and signed "Tho. Johansen," Master, S. S. Fort Morgan," and I ask you if you recognize that document as bearing your signature, as well as the signature of the master of the steamship Fort Morgan?

(Document in question handed to witness. Witness examines same.)

Objection: Mr. Leovy:

This is objected to on the ground in the first place, it is a mere self-serving declaration on the part of the Central American Cattle Company, Incorporated, made after the event, that the statements therein contained are hearsay statements, not under oath, and that as to the alleged statements of the officers, the same objection obtains as has been made to the alleged statements by the master; on the further ground that if it is introduced as a contract, it is an attempt to vary the charter party and entirely beyond the authority  
 425 of the master; and on the further ground that no such agreement has been averred, in any of the pleadings, and the attempted introduction at this time comes entirely too late; and on the further ground that the original contract has never been called for, and no attempts made to insist upon its production, and that the alleged copy proposed to be introduced is not the best evidence.

A. This is a duplicate of an original letter that I gave to the master of the steamship Fort Morgan on

December 5th, 1917, in which I declared the steamship Fort Morgan off hire, simultaneously upon its returning to Port Limon, after turning back on its prospective voyage to Jacksonville, Florida.

Q. Did you see the master sign the document?

A. I did; I saw the master sign this document; he accepted the terms and conditions as enumerated therein for account of the owners of the vessel. This document was taken to the American consul in Port Limon, and I extended protest before him. I have his document here, extended protest before American consul against the payment of charter hire on account of the vessel being unseaworthy; I had this document prepared by the American consul, which bears his original signature. Attached to this document is a copy of  
426 the letter to the master, verbatim, also tendered by the American consul in Port Limon, together with the original protest before the American Consul.

Mr. Leovy:

Do I understand that these are offered or that counsel will offer them?

Mr. Young:

I will offer them.

Offer: Mr. Young:

In connection with the testimony of the witness, I offer, introduce and file in evidence the letter just identified by the witness, dated December 5th, 1917, which I will mark for identification "Whilden-1", also certified copies of the note of protest and extended protest, together with attached documents referred to by the wit-

ness, which I will mark for identification "Whilden-2" and "Whilden-3."

Objection: Mr. Leovy:

All of these documents are objected to on the ground that the statements in the letter and in the protest are hearsay in the second degree, being merely alleged statements made to the witness by the persons named in the letter by whose declarations this objector is in no wise bound.

#### Cross Examination.

By Mr. Grace:

Q. You say that at the time that the cattle fittings were put up and the cattle put in, all the fittings were in good order and condition. And the cattle, what have you to say in regard to the condition of the cattle themselves?

A. They were in absolutely perfect condition.

Q. And when the Fort Morgan returned on the occasion that you speak of, was there much, little or no list at all to the vessel?

A. There was about a 37 degree list to port.

Q. What effect, if any, did that have on the cattle on board?

A. It had this effect; the effect that the cattle on the starboard side of the ship came against the pens and were suffocated, crippled and maimed; the cattle on the port side of the ship went against the side of the vessel, consequently they were suffocated, crippled and maimed, and the cattle on the shelter deck went against the port side partitions of the cattle pens and lots of legs were broken; the cattle were crippled, internally bruised and

absolutely unfit for any merchantable condition, not in a merchantable condition.

Q. And any of them killed?

A. A good many.

Q. Now, what was the cause of them going against the cattle fittings on one occasion and against the side of the ship on another occasion?

428 A. Because the vessel was listed to port, and naturally, by being listed to port, the cattle on the starboard side of the vessel they went against the pens instead of the side of the vessel, and those on the port side went against the port side of the vessel.

Q. What was done with the cattle when the vessel came to port then?

A. Soon after the survey was held, it was found about 220 cattle were dead and otherwise mutilated, internally bruised and unfit as merchantable cattle. A meeting was held by the port sanitary authorities, and this commission decided that the master must put to sea about fifteen or twenty miles and discharged the dead and dying and crippled and maimed cattle.

Q. Were the live cattle taken off first before she went out to sea?

A. They were discharged first, yes, sir.

Q. So that put the vessel itself in better condition to go to sea then?

A. Yes, sir; a good many of the dead cattle were unloaded from the ship on to the wharf before the vessel left the wharf, and after the live cattle were discharged, these dead cattle were placed back on board of the vessel. This had to be done on account of the dead cattle being in the way of the live cattle in the vessel, and they had to be removed first.

Q. The orders which you speak of, which  
429 were given by the health authorities, to take  
the dead cattle to sea and dump them, was that  
order carried out by the master of the ship?

A. Yes, sir.

Q. With respect to the cattle that were maimed and  
so forth, the live stock, what was done with those?

A. They were placed on pasture by Lloyd's agent, at  
a place called Sabiria, and there they remained.

Q. Was everything done that could be done to save  
the lives of the cattle?

A. Yes, sir.

Q. And better their condition?

A. Yes, sir.

By Mr. Leovy:

Q. Before going into the details with regard to this  
transaction, let me ascertain the names and relations of  
the various persons. They were, for instance, Lloyd's  
agent; who was he, what was his name?

A. Lloyd's agent at San Jose, Costa Rica, was Mr.  
Lyons.

Q. But Mr. Lyons does not appear in any of these  
matters here, but Mr. Doswell appears, I believe?

A. Lloyd's agent at Port Limon was appointed by  
Mr. Lyons, he conferred authority on Mr. Doswell, who  
represented the United Fruit Company, as Lloyd's agent.

Q. Both of them were United Fruit Com-  
430 pany people, is that right?

A. Who?

Q. Doswell and Lyons?

A. Mr. Doswell was the agent for the United Fruit  
Company.

Q. And who was Mr. Lyons?

A. Mr. Lyons, to my knowledge, was a merchant in San Jose, Costa Rica.

Q. Mr. Doswell was present, was the person who was active in all these matters; Mr. Doswell is the man who made these reports about the ship?

A. Yes, sir.

Q. And Mr. Lyons was not there at all?

A. Not to my knowledge.

Q. Mr. Doswell is the regular agent of the United Fruit Company at that place?

A. Yes, sir.

Q. Captain Heckman, whose name figures in these matters, was employed by whom?

A. By the United Fruit Company, as port captain.

Q. Mr. Romagosa, what was he?

A. He was the port captain for the Republic of Costa Rica.

Q. The pilot was who, on this ship?

A. Captain Sorensen.

Q. In whose employ was he?

A. He was in the employ of the United  
431 Fruit Company as port pilot.

Q. And you were in the employ—

A. Of the Central American Cattle Company, Incorporated.

Q. That Central American Cattle Company, Incorporated, has at least one director identical with the directors of the United Fruit Company, that is Mr. Ellis, is it not?

A. Mr. Crawford H. Ellis, yes, sir.

Q. How many others?

A. Four others.

Q. All identical, the same directors, all identical with the United Fruit Company people?

A. No, sir; Mr. Ellis is the only member of our directorate connected with the United Fruit Company.

Q. And he is the agent of the United Fruit Company in New Orleans?

A. He is Vice-President of the Domestic Division, Southern Division, of New Orleans.

Q. And what office did he hold in your company?

A. He was a director.

Q. Do you hold any office in connection with the United Fruit Company?

A. No, sir.

Q. I notice that all of this occurred on November 29th, 1917, about the 28th or 29th?

A. It occurred on November 29th, 1917.

432 Q. And you made that protest you have referred to on what date?

A. I made my note of protest at 11:00 p. m. on the night of November 29th, 1917.

Q. And you carried out your protest when?

A. I extended my protest on December 5th, 1917.

Q. So at that time you had about all the information that you had later, I imagine?

A. At 11:00 p. m. on the night of the 29th, we didn't have sufficient information to enable us to write the letter that was written on December 5th.

Q. On December 5th, then, you had what you might call full information?

A. As much as we could obtain at that time.

Q. You have not stated anything that was not in that letter that I know of, anything else that you knew of that was not in that letter I mean; your testimony seems to be in substance what is contained in that letter; is that right?

A. You say my testimony here now seems to you to be in substance what is contained in that letter?

Q. Yes.

A. There is a whole lot in my testimony now that is not contained in that letter.

Q. There is no reference to anything you have learned since, you are simply referring to matters, whatever they may be, in your testimony?

A. I am referring to the facts that happened in Port Limon, on this occasion; I am giving the facts that happened.

Q. At any rate, you wrote that letter on December 5th, making the statements therein contained?

A. Yes, sir.

Q. I notice on December 26th you say your company brought suit against Armour & Co., in which it refers among other things, to the issuance of the bill of lading, and avers, in Article 11, that you performed in good faith all of your duties under the contract of October 3, 1917, and under the live stock contract and under the bill of lading—

Objection: Mr. Grace:

I object to that as immaterial, incompetent and inadmissible.

Q. —that is sworn to by your attorney as upon information which he received. I notice that that petition contains no reference at all to these various facts that you are now asserting, including reports which had reached you of defects in the tanks. What was the reason for that?

A. Our suit was against Armour & Co. for the amount of money involved.

Q. Including freight, I believe?

A. Including the freight, yes, sir.



434 Q. Did you consider at that time that you had carried the cattle?

A. Our charter party, our agreement with Armour & Co. was that the freight was to be prepaid.

Q. And if it had not been prepaid you for some reason—we will come to that later—you thought you were entitled to recover it even although subsequent circumstances showed it was not due; is that right?

A. By right we should have received the freight in cash prior to the vessel sailing; in other words on the issuance of the bill of lading.

Q. And you think that this allegation that you have performed all the allegations contained in the bill of lading was unnecessary?

A. I don't gather just exactly what you want me to say.

Q. I have no control over what you are going to say; I am simply asking you a question. I don't mean to answer you in a flippant way. If you don't understand my question, I can repeat it, but I think I have made it fairly plain. Your allegation in here is that you performed all of your duties under the contract, which I take it included the carrying of cattle unless you were prevented from doing so from some legal defence.

A. The Central American Cattle Company  
435 Incorporated, was not prevented from delivering under its contract. She delivered, according to our contract, free on board steamer. It was up to the ship to deliver that cattle in Jacksonville, Florida.

Q. You observe that that bill of lading was made by your company, direct by your company, with Armour & Co.?

A. We were charter owners of the steamship Fort Morgan.

Q. And you gave a bill of lading, in which you agreed to carry those cattle, is that right?

A. We gave a bill of lading receipting for so many head of cattle. There were, to my knowledge, 420 head which were to be transported by this vessel. We executed a live stock contract, which was signed and accepted by Armour & Co.'s representative, which speaks for itself. After the ship sailed from Port Limon, Costa Rica, it was naturally up to the ship to deliver her cargo.

Q. That is not what you said in your petition, and while you may state all that if you please, that is not what I asked you. Your statement in your petition was not that it was up to the vessel to carry, but that the contract had been performed. That is what I am drawing your attention to. If you consider that a sufficient answer, I will let that alone and go on to something else.

A. In other words, you want to know from me if we have complied with our contract with Armour  
436 & Co. to deliver cattle at Jacksonville.

Q. I want to know why you now apparently, as I understand your testimony, say that you didn't comply with your contract while you then said that you did?

A. I have never made any statement that we didn't comply with our contract.

Q. And in the contract you include the bill of lading; is that correct?

A. Our contract with Armour & Co. does not state anything about bill of lading, but we merely made a contract with Armour & Co. for delivery of the cattle free on board steamer. The issuance of the bill of lading was to be made by Armour & Co.'s representative as shipper.

Q. There is nothing about that in your contract or bill of lading at all, and the bill of lading actually delivered was one which was signed on behalf of your company; you appreciate that?

A. As shippers, as the steamship company we issued the bill of lading.

Q. What took place actually down at Port Limon after this transaction; did you draw on Armour & Co.?

A. Our contract with Armour & Co. was that we were to be paid immediately upon receipt of the cattle, viz:  
at New Orleans, when the ship was loaded with  
437 a certain quantity of cattle weighing so many tons.

Q. Then you drew on Armour & Co.?

A. We didn't draw on Armour & Co. Our office at New Orleans advised the Armour & Co. representative here that 420 head of live cattle had been loaded, weighing a stipulated tonnage, under which circumstances we were entitled to so much money.

Q. Did they pay you?

A. At that time, no.

Q. Did they refuse to pay you?

A. They did.

Q. On what ground?

A. They refused to pay us on the ground that the cattle had been shipped on an unseaworthy vessel.

Q. They considered then it was your obligation to furnish a seaworthy vessel?

A. We furnished a vessel with that classification; in other words, I believe that the Fort Morgan is classified under the Bureau Veritas.

Q. You considered then she was seaworthy?

A. The only thing that we can go by is Lloyd's certificate or survey, and it is not our purpose or any one

else's purpose to go and ask the master of a vessel is his vessel seaworthy?

Q. You considered then she was seaworthy?

A. We naturally assumed that the vessel was  
438 seaworthy.

Q. Did you make this demand after all these occurrences took place?

A. We sent a cable to Armour & Co. immediately after the vessel left Port Limon, stating that we had delivered 420 head of live cattle weighing so many tons, and we were entitled to receive so much money.

Q. You didn't get it?

A. They didn't make payment immediately, no, sir.

Q. Not immediately, but, as a matter of fact, when this suit was filed, they hadn't paid it, had they?

A. No; they hadn't paid it.

Q. And, as a matter of fact, when Armour & Co. filed a libel on January 24, 1918, about two months after these occurrences, in which they aver, in article 11, that the vessel had been paid for its services and freight paid, as a matter of fact, nothing at that time had been paid at all, had it?

A. To my knowledge, when Armour & Co. filed that suit against the Fort Morgan, that is the proper name, Armour & Co. and ourselves had reached an amicable settlement.

Q. But nothing had been paid, not a cent?

A. Armour & Co. had paid.

Q. No; I think you are mistaken. Now I will ask you to refresh your recollection, because we have the actual agreement, and this agreement provided  
439 when the money should be paid, and if I am not mistaken, we have the vouchers showing the payment.

A. I have a copy of that same agreement in my hand, and I will look at it.

Q. Yes, and you will find that whatever that money was, it was to be paid on the sailing of a certain ship.

A. Our agreement with Armour & Co. was dated January 15th, 1918.

Q. Yes, and the libel was filed nine days later?

A. Under this agreement with Armour & Co., they obligated themselves to pay a certain amount of money.

Q. \$19,000 to be paid when the steamer Ellis or better should leave New Orleans; is that correct? You will find that at the end of the second page. That was the first payment to be made under the agreement, that is, one-half of it was to be paid at that time and the remainder when she was surveyed at Port Limon. Do you know when either of those events took place?

A. Armour & Co. agreed to pay \$9500 when the steamship Ellis, or its equivalent, or better, should leave New Orleans, Louisiana, for Port Limon, Costa Rica.

Q. When did she leave?

A. I don't remember exactly.

Q. You don't undertake to say that it was within  
440      that nine days, would you; and let me ask you  
         something else while we are speaking of that  
         nine days. This is what is described as a purchase agreement. It is true it is dated New Orleans January 15, but I take it it had to be signed by some one in Chicago. Have you any idea when it was actually signed?

A. Yes, sir; it was signed in Chicago on January 18, 1918.

Q. And then do you know when the Ellis left, or do you know when the first payment was made?

A. I don't remember the exact date of the sailing of the Ellis, but I do know that immediately upon the sailing of the Ellis, that \$9500 was paid to the Central American Cattle Company, Incorporated, by Armour & Co.

Q. Then you don't know that that payment was made before the filing of the libel, which was nine days after this agreement was prepared, and seven days after this, or to be more exact, I believe six days after it was signed in Chicago. Would you be prepared to swear that the Ellis left in the meantime?

A. No; I couldn't make an oath that the Ellis had sailed in the mean time, as I don't know.

Q. And you certainly wouldn't be prepared to make oath that she left New Orleans, reached Port Limon, and was examined in the mean time, in that six days, would you? I am not certain, but I think we have the dates of those departures and they will show. I simply  
441 want to put you on your guard.

A. I understand; you are very careful about all I say and all that, but it is utterly impossible for the vessel to leave New Orleans and arrive in Port Limon within six days and be examined in Costa Rica—within six days of January 15 I mean—when this agreement was not dated until January 18th.

Q. So then, your statement that this payment had been made at the time this libel was filed is obviously an error as to the second half, and may have been an error as to the first half; is that correct?

A. If the dates of the libel are as stated, why they run so close together with the dates of the agreement with Armour & Co., my knowledge does not justify me in stating, because I don't know the exact date of the sailing of the Ellis.

Q. When Armour & Co. made these payments at New Orleans, it was long subsequent to all these occurrences, it was two months after these occurrences you have described that took place at Port Limon; is that right?

A. About two months after the occurrence.

Q. There was no question or suggestion at that time or in that agreement that the Fort Morgan was to sail from Port Limon and carry this cattle at all, was there; that was not contemplated under this agreement at all; you had all finished with the Fort Morgan; is that right?

442

A. We had finished with the Fort Morgan.

Q. I mean to say this was an agreement for the carriage of cattle by the Fort Morgan on which this payment was made?

A. No; the Fort Morgan was not to handle any more cattle.

Q. And it was made in settlement of a demand on your part, on the part of your company, in which you state, I am not going to attempt to discuss it again, but in which you state what is stated in this petition, that your contract had been complied with, and this amount was paid in settlement of that; is not that right?

A. This amount of money was paid on Armour & Co's. part in a spirit of compromise.

Q. That has been already explained by their representative at that point?

A. Yes, sir.

Q. That bill of lading, what became of that all this time?

A. The ship's bill of lading?

Q. Yes; not the ship's bill of lading, your bill of lading, but you can describe it as you please, the bill of lading.

A. The bill of lading; one copy is kept in the office of the United Fruit Company at Port Limon, the master was given a copy of it, Armour & Co's. representative at Port Limon was given a copy of it, and the original went to Armour & Co., and I retained a copy.

Q. When Armour & Co. refused to pay you, what did they do with the bill of lading?

A. That I don't know.

Q. But they did refuse to pay the price or freight up to the time when this agreement was made?

A. Their refusal to pay the value of the cattle and the freight was on account of their stating that we had delivered the cattle on an unseaworthy vessel.

Q. But they nevertheless did pay it finally, but in a spirit of compromise, as you say?

A. In a spirit of compromise they paid us part the value of the cattle and freight.

Q. And at that time all the circumstances were fully known to the parties, to Armour & Co. and your company and everybody else; all the claims that had been made were fully known to everybody; is that right?

A. No; Armour & Co. had a claim that some cattle had been returned to pasture and objected to paying.

Q. And you adjusted that too?

A. No; that could not be adjusted on account of the cattle being in an unhealthy condition on account of internal bruises that we didn't ascertain for six months.

Q. You provided for the adjustment of that?

A. We made a provision that these cattle would be handled with the best of care in Costa Rica, and upon the disposition of the cattle, the final sale of them, we had an agreement with Armour & Co. how the funds would be disposed of.



Q. That is covered by that agreement there?

A. That is covered by the same agreement you have reference to.

Q. You were there when the ship sailed?

A. I was.

Q. And you were there during the time she was loading?

A. I was.

445 EXHIBIT WHILDEN-2—AFFIDAVIT OF  
STEWART E. McMILLIN, AMERICAN  
CONSUL, COSTA RICA DATED 12/6/17  
AND LETTER O. R. WHILDEN TO  
MASTER SS FORT MORGAN DATED  
12/5/17.

Filed February 1, 1922.

Republic of Costa Rica,  
Province of Limon,  
Consulate at Port Limon.

ss.

Before me, the undersigned Consul of the United States of America, duly commissioned and qualified, at Port Limon, Costa Rica, personally appeared O. R. Whilden, who being duly sworn doth depose and say that he is President of The Central American Cattle Co., Inc., charterers of the Norwegian Steamship Fort Morgan, and that on November 29th, 1917, at 11 P. M., he made a protest, in writing to the Master of said Steamship Fort Morgan against payment to charter hire from the time that the steamer turned back to Port Limon, discontinuing the voyage from Port Limon to Jacksonville, Florida, with a cargo of live cattle, until such time as the Master or Owners, of the said vessel can re-deliver said vessel in a good, seaworthy condition, suitable for proper service.

Deponent further states that on the first day of December, 1917, he did register the above affidavit and protest in the American Consulate at Port Limon, Province of Limon, Republic of Costa Rica.

Deponent sayeth further that Lloyd's Agent in San Jose, C. R., caused a survey to be had on the Norwegian Steamship Fort Morgan on December 3rd, 1917, for the purpose of finding out the cause or causes of her taking a heavy list while on the voyage from this port to Jacksonville, Florida, U. S. A., with a cargo of live cattle, her subsequent return to this port and present seaworthiness.

Deponent sayeth that, according to survey held on this vessel, at this port, on December 3rd, 1917, by Representatives of Lloyd's Agency, in San Jose, Costa Rica, it was found that the Norwegian S/S Fort Morgan is now seaworthy only while in ballast, or if loaded with a heavy cargo which would give her sufficient stability not to require ballast in No. 1 tank. It was also found that before loading a light or movable cargo, or deck load, which would necessitate the use of No. 1 tank, for ballast, that this tank be tested, and if found leaking, as reported by the Ship's Officers, be satisfactorily repaired and retested.

Deponent states that under the above circumstances, he does further protest, and extend protest, against the payment of charter hire by his Company to Owners, from the time said vessel discontinued her voyage from Port Limon, Costa Rica, to Jacksonville, Florida, U. S. A., until such time as the Master, or Owners, comply with recommendations made by Lloyd's Surveyors, making all necessary repairs to put the ship in good, seaworthy condition, fit for proper service, upon the performance and completion of which, satisfactory to Lloyd's Representatives, or the proper Underwriters, and the present

Charterers, the Norwegian Steamship Fort Morgan, will, then, resume her charter with The Central American Cattle Co., Inc., Deponent further sayeth that the Master of the above named vessel has accepted the above terms and conditions, for account of the Norwegian Steamship Fort Morgan, and Owners.

446 Deponent, further, attaches copy of his letter to the Master of the Norwegian Steamship Fort Morgan, dated Port Limon, Costa Rica, December 5th, 1917, 6 P. M., extending protest against the payment of charter hire, as set forth in the foregoing document. The above letter being served on the Master, he has signified his acceptance of the terms and conditions as stated in the document, for account of the Norwegian Steamship Fort Morgan and Owners, he serving as their representative in this Port.

Subscribed and sworn to before me this sixth day of December, 1917.

(Signed)

STEWART E. McMILLIN,  
American Consul.

(Signed)

O. R. WHILDEN.

A true copy, certified to by,

(Signed)

STEWART E. McMILLIN,  
American Consul.

American Fee Stamp Consulars Service. (\$2.00) (Seal).

447 Port Limon, C. R., Dec. 5th, 1917 6 P. M.  
Master, Norwegian S/S Fort Morgan,  
Port Limon, Costa Rica.

Dear Sir:

On November 29th, 1917, at 11 P. M., I wrote you protesting against the payment of charter hire, from the

time you discontinued your voyage from this port for Jacksonville, Fla., with a cargo of live cattle, until such time as your ship is in a good, seaworthy condition, fit for proper service.

According to survey held on your vessel, at this port, December 3rd, 1917, by representatives of Lloyd's, it was found that the Fort Morgan is now seaworthy only while in ballast, or if loaded with a heavy cargo which would give her sufficient stability not to require ballast in No. 1 tank. It was also decided that before loading a light or movable cargo, or deck load, which would necessitate the use of No. 1 tank for ballast, that this tank be tested, and if found leaking, as repored by your officers, satisfactorily repaired and retested.

Under the circumstances there is no cargo we can load you with here, and therefore, I am accepting dispatch of the S/S Fort Morgan in ballast for New Orleans, where you can make necessary repairs, and when you have done so, to the satisfaction of Lloyd's and ourselves, you will resume your time charter with us.

Yours very truly,

THE CENTRAL AMERICAN  
CATTLE CO., INC.,

(Signed)

O. R. WHILDEN,  
President, Charterers.

Terms and conditions as stated above, accepted, for Owners.

(Signed)

THO. JOHANNESSEN,  
Master S. S. Fort Morgan.

Witnesses:

(Signed)

C. CORDOBA,

(Signed)

F. A. PLOCHE.

A true copy certified to by,

(Signed)

STEWART E. McMILLIN,  
American Consul.

American Consular Service Fee Stamp \$2.00.

448 EXHIBIT WHILDEN 3—AFFIDAVIT OF  
STEWART E. McMILLAN, AMERICAN  
CONSUL, DATED 12/1/17.

Filed February 1, 1922.

Republic of Costa Rica,  
Province of Limon,  
Consulate of Port Limon, ss.

Before me, the undersigned Consul of the United States of America, duly commissioned and qualified, at Port Limon Costa Rica, personally appeared O. R. Whilden, who being duly sworn doth depose any say that he is President of the Central American Cattle Co., Inc., Charterers of the Norwegian Steamship Fort Morgan, and that on November 29th, 1917, at 11 P. M., he made protest to the master of said Steamship Fort Morgan against payment of charter hire from the time that the steamer discontinued voyage from Limon to Jacksonville, Florida, with a cargo of live stock, until such time as the Master, or Owners, of the vessel can deliver said vessel in a good, seaworthy condition, suitable for proper service.

Deponent further states that a copy of the protest made to the Master was sent to the Owners of the vessel.

Subscribed and sworn to before me this 1st day of December, 1917.

(Signed) STEWART E. McMILLIN,  
American Consul.

(Signed) O. R. WHILDEN.

A true copy, certified to by,

(Signed) STEWART E. McMILLIN,  
(Seal) American Consul.

American Consular Service Fee Stamp (\$2.00).

449 INTERVENING LIBEL OF THE CENTRAL  
AMERICAN CATTLE CO. INC.

Filed January 29, 1918.

United States District Court, Eastern District of Louisiana, New Orleans Division.

Armour and Company,  
vs. No. 15811 In Admiralty.  
S. S. "Fort Morgan".

To the Honorable Rufus E. Foster, Judge of the District Court of the United States for the Eastern District of Louisiana, New Orleans Division:

The Intervening Libel of The Central American Cattle Company, Inc., against the Steamship "Fort Morgan", her engines, apparel and equipment, now in the custody of the United States Marshal under an admiralty warrant issued in the above entitled and numbered cause, and against all persons lawfully claiming or intervening herein for their interest therein, in a cause of contract, civil and maritime, alleges as follows:

First: At all the times hereinafter mentioned, the intervening libelant was and is a corporation created and existing under the laws of the State of Louisiana, with its domicile in the City of New Orleans, said State.

Second: The Norwegian Steaship "Fort Morgan" is now within this District and in the custody and within the jurisdiction of this Honorable Court.

Third: On August 23rd, 1917, in the City of New Orleans, by charter party, the Gulf Coast Plantation Company let the Steamship "Fort Morgan" unto intervening libelant for a period of twelve calendar months,

for a consideration of Sixteen Thousand Dollars (\$16,000.00) hire per calendar month. A  
450 copy of the said charter-party is hereto annexed and made part hereof in its entirety, with the same force and effect as if it was set out in full herein. It is marked for identification "Intervening Libelant, Exhibit A."

Fourth: Amongst other provisions of said charter-party, it was stipulated, under Clause 7 thereof, that in the event of loss of time from deficiency of men or stores, break down of machinery or damage preventing the working of the steamer for more than twenty-four hours at sea, the payment of hire shall cease until she be again in an efficient state to resume her service. While the Steamship "Fort Morgan" was in the service of intervening libelant, during the existence of said charter-party, the steamer went aground in Cuba and was off hire 2 days and 17-2/3 hours, which, at the rate of \$516.13 per day, entitled intervening libelant to a credit on the hire of \$1412.19. However, there was in the hands of intervening libelant \$1310.26, which intervening libelant has placed to the credit of the steamer "Fort Morgan" on

the above amount due intervening libelant for the time the steamer was off hire, leaving a balance on this item due by the Steamship "Fort Morgan" to intervening libelant of One Hundred One and 93/100 Dollars (\$101.93). While the vessel was thus off hire, she consumed nine long tons of coal, which is, under said charter party, chargeable to the ship. Nine long tons of coal equal 10.08 short tons, which, at the market rate of \$6.50, amount to \$65.52, which intervening libelant is entitled to recover from the said Steamship "Fort Morgan."

**Fifth:** The said charter-party provided, in Clause 2 thereof, that the owners should, at expiration of the charter, pay for all coal left in the bunkers at the market price, at the respective port where the vessel is delivered to them. The vessel was delivered to the owners at New Orleans, Louisiana, at 10:30 o'clock a. m. of January 26th, 1918. At that time, there was left in the bunkers eighty-three long tons of coal, which amounted to 92.92 short tons, which at the market price of \$6.50  
 451 per short ton, amounted to \$604.24, which is due and owing by the Steamship "Fort Morgan" to intervening libelant.

**Sixth:** The hire, as per charter-party, has been fully paid by intervening libelant upto and including the hour and date of the re-delivery of the steamer to the owner.

**Seventh:** There is annexed hereto a statement of account showing the items due intervening libelant by the Steamship "Fort Morgan", amounting in the aggregate, to Seven Hundred Seventy-one and 69/100 Dollars (\$771.69), all of which will more fully and at large appear by reference to the said statement which is marked for identification "Intervening libelant B".



Eight: All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, intervening libelant prays leave to file this intervention, and that process issue herein in due form of law according to the course of courts of admiralty and of this Honorable Court in cases of admiralty and maritime jurisdiction, against the Norwegian Steamship "Fort Morgan", her engines, apparel and equipment and that all persons claiming any right, title or interest therein may be cited to appear and to answer upon oath all and singular the matters aforesaid and that this Honorable Court will be pleased to decree in favor of the intervening libelant the sum of Seven Hundred Seventy-one and 69/100 Dollars (\$771.69), and that said Steamship "Fort Morgan", her engines, apparel and equipment, etc., may be condemned and sold to pay the same, with interest and cost, and that intervening libelant may have such other and further relief and redress in the premises as in law and justice it may be entitled to receive.

THE CENTRAL-AMERICAN  
CATTLE COMPANY,  
INC.,

(Signed)

By O. R. WHILDEN,  
President.

(Signed)

TERRIBERRY, RICE &  
YOUNG,  
Proctors for Intervening  
Libelant.

452 United States of America,  
State of Louisiana,  
Parish of Orleans,  
City of New Orleans.

Before me, the undersigned authority, personally came and appeared Oscar R. Whilden, who, after being by me first duly sworn did depose and say:

I am the President of the intervening libellant; I have read the foregoing intervening libel and the same is true to the best of my knowledge and information.

(Signed)

OSCAR R. WHILDEN.

Sworn to and subscribed before me this 29th day of January, 1918.

(Signed)

(Seal)

**FRED C. MARX.**

Not. Pub.

## ORDER.

Let this intervening libel be filed and let admiralty process issue as prayed for.

New Orleans, January 29, 1918.

(Signed)

RUFUS E. FOSTER.

U. S. Judge.

## 453 "INTERVENING LIBELANT B."

The Central American Cattle Company, Inc.

New Orleans, La., January 28th, 1918.

Statement of amount due the Central American Cattle Company Inc., by the S/S "Fort Morgan" and Owners up to and including January 26th, 1918.

1918

Jan. 25th—To off-hire certificate signed by Captain while vessel was aground in Cuba—  
2 days, 17-2/3 Hour at \$516.13 per day  
\$1,412.19

Less balance of charter hire applied to this indebtedness ..... \$1,310.26

\$101.93

Jan. 25th—To 9 long tons of coal consumed while vessel was off-hire as per Captain's certificate—10.08 short tons at \$6.50 ..... \$ 65.52

Jan. 26th—To value of 83 long tons of coal in bunkers when vessel was delivered to owners and Charter cancelled—92.92 short tons at \$6.50 ..... \$604.24

Total ..... \$771.69

454 Note:

Intervening Libelant's Exhibit "A" attached to the Intervening Libel of the Central-American Cattle Company, Inc., same as Respondent's exhibit "A", copied at page 70 of this transcript.

455      MOTION TO DISCONTINUE INTERVEN-  
TION OF THE CENTRAL AMERICAN  
COMPANY, INC.

Filed January 31, 1918.

United States District Court, Eastern District of Loui-  
siana, New Orleans Division.

Armour & Company,

vs.      No. 15,811 In Admiralty.

Steamship "Fort Morgan."

On motion of The Central-American Cattle Company, Inc., Intervening Libelant, through its Proctors, Terri-  
berry, Rice & Young, and on suggesting to the Court that the demand contained in its intervening libel has been paid and mover desires to have its intervention discontinued:

It is ordered that the intervening libel of the Central American Cattle Company, Inc., be and the same is hereby discontinued. New Orleans, January . . . , 1918.

## 456 INTERVENING LIBEL OF P. G. JANSEN.

Filed January 29, 1918.

United States District Court, Eastern District of Louisiana, New Orleans Division.

Armour & Company,  
vs. No. 15,811 In Admiralty.  
S. S. "Fort Morgan".

To the Honorable Rufus E. Foster, Judge of the District Court of the United States for the Eastern District of Louisiana, New Orleans Division:

The intervening libel of P. G. Jansen against the Norwegian Steamship "Fort Morgan", her engines, apparel and equipment, now in the custody of the United States Marshal under an admiralty warrant issued in the above entitled and numbered cause, and against all persons lawfully claiming or intervening herein for their interest therein, in a cause of contract, civil and maritime, alleges as follows:

First: At all the times herein after mentioned, the intervening libelant was and is a ship agent residing and doing business in Trinidad and Casilda, Republic of Cuba.

Second: The Norwegian Steamship "Fort Morgan" is now within this District and in the custody and within the jurisdiction of this Honorable Court.

Third: That on or about January 18th, 1918, the Steamship "Fort Morgan" with 6400 bags of sugar on board, grounded inside Cayo Blanco, South side of Cuba.

The said steamship was consigned to intervening libelant as Agent at Trinidad, and the master of the steamer applied to intervening libelant to disburse for him and the Steamship "Fort Morgan" in connection with discharging and reloading 2436 bags of sugar in order to lighten her up so as to float her. It was distinctly understood between the master of the steamship "Fort Morgan" and intervening libelant that intervening libelant would be repaid his disbursements made in behalf of the said steamer and made necessary by her grounding as already alleged. The disbursements made on behalf of the steamship "Fort Morgan" in discharging and reloading her cargo for labor, lighterage, tug boat service and all other incidental and necessary expenses in connection  
 457 therewith amounted to \$1685.92, for all of which intervening libelant has a maritime lien on the said Steamship "Fort Morgan."

Fourth: No part of said disbursements have been repaid to intervening libelant, notwithstanding amicable demand.

Fifth: All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, intervening libelant prays leave to file this intervention, and that process issue herein in due form of law according to the course of courts of admiralty and of this Honorable Court in cases of admiralty and maritime jurisdiction, against the Norwegian Steamship "Fort Morgan", her engines, apparel and equipment, and that all persons claiming any right, title or interest therein may be cited to appear and to answer upon oath all and singular the matters aforesaid and that this

Honorable Court will be pleased to decree in favor of intervening libelant the sum of \$1685.92, and that said Steamship "Fort Morgan" her engines, apparel and equipment, etc., may be condemned and sold to pay the same, with interest and costs, and that intervening libelant may have such other and further relief and redress in the premises as in law and justice it may be entitled to receive.

(Signed)

**TERRIBERRY, RICE &  
YOUNG,**

Proctors for P. G. Jansen, Inter-  
vening Libelant.

458      United States of America,  
          State of Louisiana,  
          Parish of Orleans,  
          City of New Orleans.

Before me, the undersigned authority, personally came and appeared Geo. H. Terriberry, who, after being by me first duly sworn, according to law, did depose and say:

I am one of the proctors for P. G. Jansen, intervening libelant; I have read the foregoing intervening libel and the same is true to the best of my knowledge and information. The sources of my knowledge are statements contained in cables from P. G. Jansen, Intervening Libelant, and from Louis V. Place & Company of Havana, addressed to Page Jones, of Mobile. The reason why P. G. Jansen does not make this verification is that he is in Cuba and not within the Eastern District of Louisiana.

(Signed)

**GEO. H. TERRIBERRY.**

Sworn to and subscribed before me this 29th day of January, 1918.

(Signed)

**FRED. C. MARX,**

(Seal)

**Not. Pub.**

ORDER.

Let this intervening libel be filed and let admiralty process issue as prayed for.

(Signed)

RUFUS E. FOSTER,  
U. S. Judge.

New Orleans, January 29th, 1918.

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459      MOTION AND ORDER DISCONTINUING  
INTERVENTION OF P. G. JANSEN,  
AND CANCELLING STIPULATION AND  
RELEASE BOND.

Filed Feb. 19, 1918.

United States District Court, Eastern District of Louisiana, New Orleans Division.

Armour and Company,

vs.      No. 15,811 In Admiralty.

S. S. "Fort Morgan".

On motion of P. G. Jansen, intervening libellant, through Terriberry, Rice & Young, proctors, and on suggesting that the claimant of the S. S. "Fort Morgan" had paid mover his claim in full including his cost of court and the Marshall's commission on \$1,685.92, and that mover desires to discontinue his intervening libel and to have cancelled his stipulation for costs and the release bond furnished by the claimant of the S. S. "Fort Morgan",



It is ordered that the intervening libel of P. G. Jansen be discontinued; that the stipulation for costs filed by P. G. Jansen and the release bond filed by claimant of the SL SL "Fort Morgan" to secure the demand of P. G. Jansen be and they are hereby cancelled.

New Orleans, February 19, 1918.

(Signed)

RUFUS E. FOSTER,  
U. S. Judge.

# OPINION.

Filed August 10, 1922.

United States Dist. Court, Eastern Dist. of Louisiana,  
New Orleans Division.

Armour & Company,	
vs.	No. 15,811.
Steamship "Fort Morgan".	

Submitted on Merits.

This case was begun by the filing of a libel in rem by Armour and Co., against the steamship "Fort Morgan" to recover damages alleged to have been caused by a consignment of 420 live cattle shipped on the steamship, Fort Morgan, from Port Limon, Costa Rica, consigned to Armour & Co., at Jacksonville, Fla., on Nov. 28, 1917. The damage was alleged to have been occasioned by the unseaworthiness of the ship, caused by insufficient water in the ballast tanks. The libel declares on a bill of lading, signed by the master of the ship and the damages are charged at approximately \$31,000. A supplemental

libel was also filed, amplifying the allegations of the original libel.

The Fort Morgan Steamship Co., a corporation organized under the laws of Norway, claimed the ship, and after various exceptions were overruled, filed an answer. The Fort Morgan Steamship Co., also filed a petition impleading the Central American Cattle Co., Inc., a Louisiana corporation. Intervening libels were filed in the case by P. H. Jansen and by the Central American Cattle Co. Both of these interventions, however, have been discontinued and are not now before the Court. The pleadings make out quite a complicated case, but when the material facts are sifted out, it is not quite so difficult to arrive at a decision.

It appears that at one time the entire capital stock of the Fort Morgan Co., was owned by the Gulf Coast Plantation Co., which corporation was apparently controlled by a Mr. Burge, the Steamship Fort Morgan was chartered to the Gulf Coast Plantation Co. 461 and that company in turn chartered it to the Central American Cattle Co., Inc., by a time charter. On October 3, 1917, the Central American Cattle Co., Inc., of the first part, entered into an agreement with Armour & Co., of the second part, for the sale and transportation of approximately 25,000 head of cattle from Central American countries to the United States. This contract sets up that Armour & Co., was operating a slaughter house at Jacksonville, Fla., available for the slaughter of Mexican and Central American cattle, and the Central American Cattle Co. agreed to procure cattle in Central American countries and bring them to Port Limon, C. R. or such other port as might be agreed upon by the parties, there to rest, water and feed them for fifteen days, and submit them to inspection before loading. Prices are stipulated for different grades of cattle.

Payment for the cattle and freight was to be made on cable advices by Armour & Co., the value of the cattle by draft and the freight in cash.

The contract provides that the Cattle Co., shall charter and equip one or two steamers, that the steamer be stocked with sufficient water and feed for the cattle during the voyage, and excess of hay or grass to be delivered to the second party at Jacksonville, Fla., when the cattle are unloaded at actual cost, and that the Cattle Co. should provide a sufficient number of agents to properly feed, water and take care of the cattle during the voyage. That Armour & Company should not be put to any expense in connection with the feeding and taking care of the cattle before unloading in case of delay in discharging at Jacksonville, unless the delay is attributable to them.

Considering the contract as a whole it is clear that it is a contract for the sale and transportation of cattle and that delivery is to be made by the Cattle Co. at Jacksonville. If there was any doubt on this point it is removed by the interpretation of Mr. Munnecke, who signed the contract for Armour & Co. He testified that  
 462 they had contracted for the delivery of the cattle at Jacksonville, Fla.

On the date set out in the libel, November 28, 1917, 420 head of cattle were loaded on the Fort Morgan at Port Limon and the vessel cleared for Jacksonville, Fla. The captain issued a bill of lading to Armour & Co., on behalf of the charterers and there was also executed at that time what was called a cattle shipment agreement signed by the Cattle Company, through its president, and Armour & Co., through Edward J. Mitchell, its representative.

When leaving the port the vessel had a slight list. By the time she got to sea the list had increased greatly, to

such an extent that the captain deemed it wise to put back to port and unload the cattle. By that time, however, some 200 of them were dead or so badly injured that they subsequently died, and the balance of the cargo suffered more or less injury. The vessel got back safely to port. The dead cattle were disposed of and the live ones unloaded on shore.

After that the entire stock of the Fort Morgan Co. was sold and was acquired by the present owners, so that in effect the situation is practically the same as if the vessel hereof had been sold to new owners.

A controversy arose over this shipment which resulted in the Central American Cattle Company filing a suit in the civil district court for the parish of Orleans against Armour & Co. In this said petition the Central American Cattle Co. sets out that on or about October 3, 1917, petitioner and defendant entered into and made a written contract for the sale and transportation of cattle, and a copy of the agreement above referred to is annexed to the petition. That in compliance with the terms of the contract petitioner had sold and delivered 420 head of live steers to the defendant on November 29, 1917, at

463 Port Limon and the same was loaded on board the Fort Morgan. The petition also sets out the live stock agreement and the bill of lading issued by the Captain. Petitioner sets out the compliance with the contract as to notice and the refusal by defendant to pay for the freight or the value of the cattle.

This suit never went to trial but subsequently Armour & Company and the Central American Cattle Company entered into a compromise agreement at New Orleans on January 15, 1918. This agreement is too long to be summarized. By it Armour & Company and the Cattle Company settled the controversy growing out of the shipment on the Fort Morgan. Armour & Company agreed to pay

\$19,000 to the Cattle Company, and become joint owners with the Cattle Company of some 200 head of cattle that had been unloaded from the Fort Morgan and were then on pasture in Costa Rica. The agreement also contemplates future business relations between the parties.

After that agreement was entered into the original libel in this case was filed. The libel makes no mention of the compromise but sets up the payment of freight and the payment for the cattle at the full prices of the original contract and fixes the measure of damages at the freight paid on the value of the cattle at Jacksonville, Fla.

The primary liability to Armour & Co., was that of the charterers. A contract both of sale and carriage had been made by them and the bill of lading, while incidental thereto, was signed by the captain in the name of the charterers. Of course the ship would be liable to Armour & Company for damages caused by any unseaworthiness. In this connection it appears that the charterers had erected pens and other equipment for the storage of cattle above the water line on the boat. There is no doubt that the ship was unseaworthy at the time she departed on the voyage from Port Limon.

464 She was not unseaworthy however when she was first delivered to the charterers. The equipment erected by the charterers undoubtedly contributed to the unseaworthiness of the vessel. They contend that it was done with the consent of the master. It appears the master was paid \$50, by the charterers to superintend this work. This would have a tendency to make him the joint agent of both parties, if not the sole agent of the charterers. Furthermore, it was not within the authority to the master to effect any change in the charter. *Gracie vs. Palmer* 8th Wheaton at page 639.

Under the terms of the charter, on the facts in this case, the ship would be entitled to a judgment over against the charterers for any judgment in favor of Armour & Company.

Having effected a compromise with the charterers, it seems to me any suit against the ship would be barred by the compromise. Certainly Armour & Company cannot recover in this suit on the allegations of the libel.

It was also urged on behalf of the ship that the contract between Armour & Co. and the Cattle Co., was one of sale as well as transportation and therefore not cognizable in admiralty. With this I also inclined to agree.

Entertaining the above views, and on the facts as I find them, the libel must be dismissed. As there is no recovery against the respondent the petition impleading the Cattle Co. will also be dismissed. Libelant to pay all costs.

(Signed)

RUFUS E. FOSTER,  
Judge.

Aug. 10/22.

465

# PETITION FOR REHEARING.

Filed August 16th, 1922.

United States District Court, Eastern District Louisiana,  
Honorable Rufus E. Foster, Judge.

Armour & Company,

vs. No. 15,811 In Admiralty.

Steamship "Fort Morgan".

Now into Court comes libelants by and through their proctors, John D. & M. A. Grace, and moves the Court to

grant a rehearing in this cause on the following grounds, to-wit:

First: That the Court erred in holding that the libelants' action is based upon a contract for the sale and transportation of cattle.

Second: That the Court erred in failing to hold that at the time the cattle were first received on board of the Steamship Fort Morgan that she was then in an unseaworthy condition.

Third: That the Court erred in failing to hold that the cattle was sold to libelant's deliverable, at Port Limon, subject to acceptance at Port Limon by the Agent of Armour & Company, whereupon payment therefor, by draft, then and there became due and owing, and their transportation was as the property of libelants.

Fourth: That the Court erred in failing to hold that the contract sued on is not a contract for sale and transportation at risk of vendor, is manifest from the fact that if such was its intent and meaning as understood between the parties thereto, then libelants would have suffered no loss and owed nothing to the Cattle Company until delivery was made at Jacksonville, Florida.

Wherefore the premises considered, libelants pray that a re-hearing be granted herein, and upon further consideration of this cause that a judgment be rendered in favor of libelants as in their libel prayed for; and that libelants be accorded such other and further relief and redress in the premises as in law and justice they may be entitled to receive.

(Signed)

JOHN D. & M. A. GRACE,  
Proctors for Libelants.

Order: Let the foregoing petition for a re-hearing be filed; and let claimants herein show cause on the . . day of November, 1922, why a re-hearing should not be granted and the relief prayed for be allowed.

(Signed)

**RUFUS E. FOSTER,**  
Judge.

August 16, 1922.

466 HEARING OF PETITION FOR REHEARING  
AND ORDER OVERRULING SAME.

Extract from the Minutes.

November Term, 1922.

New Orleans, Saturday, December 2nd, 1922.  
Court met pursuant to adjournment;

Present: Hon. Nathan P. Bryan, Circuit Judge;  
Present Hon. Rufus E. Foster, District Judge;  
Present: Hon. Henry D. Clayton, District Judge.

(Proceedings before the Honorable Rufus E. Foster,  
District Judge.)

Armour & Company,  
vs. No. 15,811.  
Steamship "Fort Morgan".

This cause came on this day upon the petition for a re-hearing herein filed by the libellant;

Present: J. D. & M. A. Grace, Proctors for Libellant,  
mover;



Present: Denegre, Leovy & Chaffe, proctors for Respondent; and was argued by counsel;

Whereupon, it was ordered that a re-hearing in this cause be and the same is hereby refused.

467

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DECREE.

Extract from the Judgment Book.

May Term, 1922.

New Orleans, Thursday, August 10th, 1922.  
Court met pursuant to adjournment;

Present: Hon. Rufus E. Foster, Judge.

Armour & Company,  
vs. No. 15,811.  
Steamship "Fort Morgan".

This cause came on to be heard at a former day upon the pleadings exhibits, testimony and proofs as specified in the notes of evidence offered on behalf of the respective parties, and was argued by the proctors for the parties in interest and submitted, when the Court took time to consider;

Whereupon, and upon due consideration whereof, and for the reasons assigned in writing and on file herein,

It is ordered, adjudged and decreed that the libel herein be, and the same is hereby dismissed;

It is further ordered, adjudged and decreed that the petition of the Fort Morgan Steamship Company Ltd., impleading the Central American Cattle Co., as a party respondent, be, and the same is hereby, dismissed.

It is further ordered, adjudged and decreed that libelant pay all costs of suit.

Decree rendered August 10th, 1922.

Decree signed December 9th, 1922.

(Signed) RUFUS E. FOSTER,  
Judge.

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468      PETITION FOR APPEAL AND ORDER.

Filed December 20, 1922.

United States District Court, Eastern District Louisiana,  
New Orleans Division.

Armour & Company,

vs.

No. 15811.

Steamship Fort Morgan.

Central American Cattle Company called in by Claimants.

To the Honorable, the Judge of the United States District Court for the Eastern District of Louisiana:

Now comes Armour & Company, libelants in the above entitled and numbered cause, and with respect represent:

That there are errors in the final decree in the above entitled and numbered cause, entered August 15, 1922, signed December 9, 1922; said errors being to petitioners manifest prejudice and injury, and from which they desire to appeal for the purpose of having such errors corrected as herein set forth in the annexed assignment of errors, made a part hereof, marked for identification herewith "Exhibit A".

Wherefore, your petitioners pray that an order be made herein, granting to petitioners an appeal from said final decree, to the United States Circuit Court of Appeals for the Fifth Circuit, returnable according to law, with supersedeas, upon filing a sufficient bond as required by law, and that the appellees, the Fort Morgan Steamship Company, Limited, and their surety, the American Surety Company of New York, surety on the release bond, and the Central American Cattle Company of New Orleans, Louisiana brought in on petition herein, be duly cited to answer this appeal, and they pray for all general relief.

(Signed)

JOHN D. GRACE,

(Signed)

M. A. GRACE,

(Signed)

EDWIN H. GRACE,

Proctors for Armour & Co.,  
Petitioners.

### ORDER.

Considering the foregoing petition, an appeal with supersedeas is granted the above named petitioners, Armour & Company, as prayed for from the final judgment rendered in the above cause, signed in open Court on the ninth day of December, 1922, upon the above peti-

tioners giving bond in the sum of Five Hundred Dollars (\$500.00), conditioned as the law directs; said appeal to be returnable in the United States Circuit Court of Appeals for the Fifth Circuit, within thirty days from the date of this order; and that citation issue as prayed for.

(Signed)

RUFUS E. FOSTER,  
Judge.

New Orleans, December 20, 1922.

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470

#### ASSIGNMENT OF ERRORS.

Filed December 20, 1922.

"Exhibit A." Referred to in the foregoing Petition.

#### Assignment of Errors.

First: The Court having found that:

"This case was begun by filing a libel in rem by Armour & Company against the Steamship Fort Morgan to recover damages alleged to have caused a consignment of four hundred and twenty live cattle shipped on the Steamship Fort Morgan from Port Limon, Costa Rica, consigned to Armour & Company, at Jacksonville, Florida, on November 28, 1917. The damage was alleged to have been occasioned by the unseaworthiness of the ship, caused by insufficient water in the ballast tanks. The libel declares on a Bill of Lading, signed by the master of the ship and the damages are charged at approximately \$31,000.00." (See opinion of Court.)

And the Court having found that the said Steamship Fort Morgan had a list when leaving port, and still further found that:

"By the time she got to sea the list had increased greatly, to such an extent that the Captain deemed it wise to put back to port and unload the cattle. By that time, however, some two hundred of them were dead or so badly injured that they subsequently died and the balance of cargo suffered more or less injury." (See opinion of Court.)

and having still further correctly held:

"There is no doubt that the ship was unseaworthy at the time she departed on the voyage from Port Limon."

471 the Court erred in dismissing the said libel, instead of awarding commensurate damages.

Second: The Court having found, that the steamship Fort Morgan was chartered by her owners to the Central American Cattle Company, Inc., and the charter evidencing this transaction being in evidence and disclosing the following stipulation therein; to-wit:

"That the Captain although appointed by the owners, shall be under the orders and direction of the charterers as regards employment, agency or other arrangements; and the charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the Captain signing bills of lading or otherwise complying with their orders and directions." (Clause 4 Article 4 of charter).

And it being further conclusively shown that it was not until ever after libelants' cattle was actually laden and stowed on board of the said steamship Fort Morgan, consigned for delivery by said vessel to libelants at Jacksonville, Florida, that the bill of lading sued on herein was signed by the Master of that vessel, the Court erred in failing to hold the said ship liable for the losses and damages sustained by libelant, because of death and injury occasioned such cattle arising from the unseaworthy condition of said vessel.

Third: The Court erred in at all considering the contract relating to 'settlement arrived' at by and between Armour & Company and the Central American Cattle Company, in view of the fact that it had relation solely to matters aside from the liability of the ship with respect to the matters set up in this cause; and  
472 has erred in its construction of said contract.

Fourth: That when the American Cattle Company was impleaded herein by the respondents, they did not plead or attempt to set up in their defense, the settlement above referred to between themselves and Armour & Company, as operating to release them from liability in the premises, in event libelant should recover, but, under the allegations of their answer stood liable over to the respondent for any fault on their part which may have operated to the prejudice of respondents.

Fifth: That the Court erred in its construction and application of the contracts referred to by it in its opinion.

Sixth: That the clear preponderance of evidence and the law is in favor of libelants, hence the Court erred in dismissing the libel.

(Sgd.)

JOHN D. GRACE,

(Sgd.)

M. A. GRACE,

(Sgd.)

EDWIN H. GRACE,

Proctors for Appellants.

473

#### BOND ON APPEAL.

Filed Dec. 20, 1922.

Know all men by these presents, that we, Armour & Company, a corporation organized and existing under the laws of the State of Illinois, with its principal office in the City of Chicago, in said state, as principal and the National Surety Company of New York, as surety, are held and firmly bound unto the Fort Morgan Steamship Company, Limited, Claimant as owner of the steamship Fort Morgan, her tackle, etc., and to the American Surety Company of New York, (Surety on the release bond in cause hereinbelow mentioned; and the Central American Cattle Company of New Orleans, La., in the full and just sum of Five Hundred dollars to be paid to the said Fort Morgan Steamship Company, Ltd., Claimants of the Steamship Fort Morgan, and the American Surety Company, surety on the release bond, and the said Central American Cattle Company certain attorney, executors, administrators or assigns: to which payment, well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 20th day of December in the year of our Lord, one thousand nine hundred and twenty-two.

Whereas, lately at a Session of the United States District Court, holding sessions in and for the Eastern District of Louisiana, in a suit depending in said Court, between Armour & Company, Libelants against the Steamship Fort Morgan, her tackle, etc., numbered No. 15,811 of the docket of said Court, and wherein the Central American Cattle Company was brought in on petition, a final decree was rendered against the said libelant, Armour & Company, dismissing their libel with cost, which decree was signed in open court on the 9th day of December, 1922, and the said above named principal on this bond, the libelant in the above entitled and numbered cause having obtained an order of Appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the said judgment in the aforesaid suit, and a citation directed to the said Fort Morgan Steamship Company, Ltd., and the American Surety Company of New York, and the Central American Cattle Company of New Orleans, Louisiana, citing and admonishing them to be and appear before the United States Circuit Court of Appeals for the Fifth Circuit, to be holden at New Orleans, Louisiana, within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said Armour & Company shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.



Sealed and delivered in presence of—

(Signed) By **ARMOUR & COMPANY,**  
**JOHN D. GRACE, Atty., (Seal),**  
**NATIONAL SURETY**  
**COMPANY, (Seal),**  
 (Signed) **LOUIS COIRON, (Seal),**  
 Res. Vice-President,  
 (Signed) **LOUIS VALE,**  
 Res. Asst. Secretary, (Seal).

Approved by—

(Signed) **RUFUS E. FOSTER,**  
 Judge.

474

**AGREEMENT.**

Filed July 9th, 1923.

United States District Court, Eastern District of  
 Louisiana.

Armour & Company,  
 vs. No. 15,811 In Admiralty.  
 SS. "Fort Morgan".

It is hereby agreed by and between the undersigned  
 proctors that the following exhibits, to-wit:

1. Libelants Exhibit marked B-1, being Policy No. 24,102, issued by the St. Paul Fire & Marine Insurance Company.
2. Libelants Exhibit marked B-2, being Policy No. 152 issued by the Fireman's Fund Insurance Co.

3. Libelants Exhibit marked B-3, being Policy No. M. 501,373, issued by the Automobile Insurance Company of Hartford, Connecticut.

4. Libelants Exhibit marked C-1, being a document written in Spanish.

5. Exhibit "Armour & Co. B-4", filed Sept. 18, 1919, by John P. Doyle, Notary Public, being a sketch of SS Fort Morgan in ink.

Filed in the above entitled and numbered cause shall go up in the original to the United States Circuit Court of Appeals.

(Signed)

JOHN D. & M. A. GRACE,  
Proctors for Armour & Co.,  
Libelants.

(Signed)

DENEGRE, LEOVY & CHAFFE,  
Proctors for claimants, SS "Fort  
Morgan."

(Signed)

TERRIBERRY, RICE & YOUNG,  
Proctors for Central American  
Cattle Co.

475 Clerk's Office.

I, H. J. CARTER, Clerk of the District Court of the United States for the Eastern District of Louisiana, do hereby certify the foregoing 473 pages to contain a full, true, complete and perfect transcript of the record, assignment of errors and all proceedings (except certain exhibits transmitted in the original) in the cause entitled Armour & Company versus Steamship "Fort Morgan", No. 15,811 (In Admiralty) of the docket of this Court;

Witness my hand and the seal of said Court at the City of New Orleans, La., this 9th day of July, A. D. 1923.

(Seal) H. J. CARTER,  
Clerk.

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Citations omitted from the printed record, the originals thereof being on file in the office of the clerk of the U. S. Circuit Court of Appeals for the Fifth Circuit.

\* \* \* \* \*

1870

Jan 1st

Feb 1st

Mar 1st

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May 1st

Jun 1st

Jul 1st

Aug 1st

Sep 1st

Oct 1st

Nov 1st

Dec 1st

UNITED STATES CIRCUIT COURT OF APPEALS,  
FIFTH CIRCUIT.

ARMOUR & COMPANY,

versus

Appellant,

No. 4148.

FORT MORGAN STEAMSHIP CO., LTD., ET ALS.,  
Appellees.

On motion of Victor Leovy, of counsel for Fort Morgan Steamship Company, Limited, Appellee, and on tendering for filing and printing as a supplementary transcript herein, a stipulation with consent of all other counsel herein affixed thereto, and a document referred to in said stipulation; all for the purpose of correcting an omission and certain errors in the transcript as recited in said stipulation:

It is ordered:

That said stipulation and document referred to therein be filed herein, and together with this motion and order, be printed as a supplementary transcript; all at cost of mover, to be taxed ultimately as part of costs of appeal.

2 United States Circuit Court of Appeals, Fifth  
Circuit.

Armour & Company, Appellant,

vs.

No. 4148.

Fort Morgan Steamship Company, Ltd., et als., Appellees.

It is stipulated between all parties to this cause as follows:

(1) That the document described as follows in the Note of Evidence on behalf of claimant, viz:

"Fifth: Copy of petition and order in suit of the Central American Cattle Co., Inc. vs. Armour & Co., No. 122,470, Civil District Court, Parish of Orleans, Louisiana," having been omitted from the transcript by oversight of the Deputy Clerk of the Court a qua, a certified copy thereof be filed herein on appeal.

(2) That the bill of lading annexed to the libel and printed in the transcript beginning at page 9, is identical with the bill of lading offered in evidence by libelant at Chicago, Transcript, page 111, as Libelant's Exhibit A-1 and not copied in the transcript.

(3) That the charter-party attached to claimant's answer as Exhibit A, and printed in the transcript beginning at page 70, is identical with the charter-party offered in evidence by claimant at Los Angeles, Transcript page 351, as SS. "Fort Morgan" Exhibit B, and copied in the deposition, but omitted from the printed transcript.

(4) That on page 370 of the printed transcript the words "Knew it all" in sixth line from foot of page, should read "Knew it at all" to conform to the original.

3 It is agreed that this stipulation and annexed document may be filed and (with motion and order so directing) printed as a supplementary transcript at the cost of the Fort Morgan Steamship Company, Limited; to be taxed ultimately as part of costs of appeal.

DENEGRE, LEOVY & CHAFFE,  
Of counsel for Fort Morgan  
Steamship Company, Limited.  
JOHN D. and M. A. GRACE,  
Of Counsel for Armour &  
Company.  
TERRIBERRY, RICE & YOUNG,  
Of Counsel for Central American  
Cattle Co., Inc.

4

## EXHIBIT.

Filed February 1st, 1922.

Civil District Court for the Parish of Orleans.  
State of Louisiana,  
Writ of Attachment,

No. 122,470

Division "C".

Docket 4.

The Central-American Cattle Company, Inc.,  
versus  
Armour & Company.

Filed December 26th, 1917.

J. DONELON, Deputy Clerk.

To the Honorable the Judges of the Civil District Court  
for the Parish of Orleans, State of Louisiana:

The petition of The Central-American Cattle Company, Inc., against Armour & Company, with respect shows:

I.

Petitioner, The Central-American Cattle Company, Inc., is a corporation created and existing under the laws of the State of Louisiana, with its domicile in the City of New Orleans, said State.

II.

Defendant, Armour & Company, is a corporation created and existing under the laws of the state of Illinois with its domicile in the City of Chicago, said State.

III.

On or about October 3rd, 1917, petitioner and defendant entered into, and made, a written contract for the sale and transportation of cattle. A true copy of this contract is hereto annexed and made part hereof, in its entirety, as if set forth herein in detail, it is marked, for identification, "Plaintiff One."

IV.

In compliance with all of the terms of said contract petitioner sold and delivered to defendant, on or about November 29th, 1917, at Port Limon, Costa Rica, four hundred twenty (420) head of live steers weighing 346,302 pounds live weight, which defendant, through Edward James Mitchell, its representative at Port Limon, received and accepted in good condition, properly loaded



on board the Norwegian Steamship "Fort Morgan," all  
of which will appear by reference to the an-  
nexed receipt of the defendant, through its  
said representative which is marked for identi-  
fication, "Plaintiff Two."

## V.

Defendant, through Edward James Mitchell, its representative at Port Limon and petitioner entered into and made on November 29th, 1917, a written live stock contract relative to said cattle so delivered on board the S. S. "Fort Morgan," a copy of which contract is hereto annexed and made part hereof, in its entirety, as if set forth herein in detail, and is marked, for identification, "Plaintiff Three."

## VI.

On or about November 28th, 1917, Thomas Johannesen, Master of the S. S. "Fort Morgan," executed and issued a bill of lading on behalf of petitioner, covering said cattle so delivered on board the S. S. "Fort Morgan", and shipped by defendant, consigned to its own order at Jacksonville, Florida, which bill of lading defendant, through Edward James Mitchell, its representative at Port Limon received and accepted. A copy of the bill of lading is hereto annexed and made part hereof, in its entirety, as if fully set forth herein, and is marked for identification "Plaintiff Four;"

## VII.

In accordance with the terms of the contract between defendant and petitioner of October 3rd, 1917, Exhibit One, defendant was notified by cable from its representa-

tive at Port Limon of the number of cattle accepted and loaded on the steamer and of the weight of the same.

### VIII.

Under the terms of the contract of October 3rd, "Exhibit One", defendant was, upon receiving the advice referred to in the preceding paragraph, to pay petitioner, by draft at the rate of five cents per pound, United States money, without discount or commission therefore, on delivery of the cattle hereinabove referred to, which weighed as already alleged herein, 346,302 pounds, petitioner was entitled under the contract of October 3rd, 1917, Exhibit One to demand and receive of defendant the price thereof, 346,302 pounds at five cents per pound, that is, in the aggregate \$17,315.10.

### IX.

Upon receipt by defendant of the cable advices referred to in paragraph seven hereof petitioner became  
6 entitled to demand and receive of defendant as per the terms of the contract of October 3rd, 1917, Exhibit One, freight on four hundred twenty (420) head of cattle at the rate of \$25.00 per head or in the aggregate \$10,500.00 all in accordance with the said contract of October 3rd, Exhibit One the live stock contract, Exhibit Three, and the bill of lading Exhibit Four, which said freight petitioner was to retain whether earned or not earned, and whether vessel lost or not lost.

### X.

Petitioner made due demand of defendant for the price of said cattle so delivered to defendant that is

\$17,315.10, and for the freight due for the transportation of said cattle as per the contracts referred to, that is, \$10,500.00 or in the aggregate, \$27,815.10, and notwithstanding that all of said money was due as aforesaid, the defendant has refused to pay all, or any part thereof.

#### XI.

Petitioners performed in good faith, all of its duties under the said contract of October 3rd, 1917, and of the live stock contract, and of the bill of lading, but defendant, notwithstanding amicable demand, has failed and refused, and still refuses to pay the price of the cattle delivered to it as per contract, and to pay the freight past due thereon, as per contract, and by reason of such failure and refusal to pay the price of the cattle and the freight, as aforesaid, defendant has violated the contract of October 3rd, 1917, the live stock contract, and the terms and conditions of the bill of lading.

#### XII.

As a result of the failure and refusal of the defendant to perform its obligations and duties under the contract of October 3rd 1917, petitioner has sustained and will sustain serious damages amounting to the sum of Seven Thousand Nine Hundred Ninety and 40/100 (\$7,990.40) Dollars, as follows:

(a) Cash expended arranging contract with defendant and organizing cattle business in Costa Rica in order to carry out the contract of October 3rd, 1917, which cash so expended would have been absolved in the shipment of 1100 head of cattle had defendant carried out its contract, \$3300.00 at a cost of \$3.00 per head on the 680 heads not delivered \$2,040.00

	B. Cash expended erecting cattle fittings pens, etc., in steamer "Fort Morgan" preparatory to making shipments of cattle under the contract of October	
7	3rd, 1917, which would have been absolved in the ship of 1100 head of cattle had defendant carried out its contract, \$1,823.23 at \$1.66 applying on 680 heads not delivered .....	\$1,128.80
	(c) Value of lost hire of steamer "Fort Morgan" caused by arranging cattle fittings, pens, etc., which would have been absolved in the shipment of 1100 heads of cattle \$1,823.15 at a cost of \$1.62 per head applying on 680 head not delivered .....	\$1,101.60
	(d) Estimated net profit on ocean transportation as stipulated in the contract of October 3rd, 1917, on 680 head of cattle not delivered .....	\$1,000.00
	(e) Estimated amount of net profit on sale of 680 heads of cattle weighing approximately 544,000 pounds not delivered due to the fault of defendant as aforesaid, on half cent per pound .....	\$2,720.00
	Total damage .....	\$7,990.40

## XIII.

The defendant resides out of the State of Louisiana, and has no agent within the State of Louisiana for service of process, and a writ of attachment is necessary to protect petitioner in the premises.

## XIV.

Petitioner believes that the New Orleans National Bank, the Commercial National Bank, the Hibernia Bank & Trust Company and the Whitney-Central National Bank, all domiciled in the City of New Orleans, are indebted to said Armour & Company, defendant Company, or have property in their possession or under their control, belonging to Armour & Company, defendant, and petitioner desires that the said New Orleans National Bank, Commercial National Bank, Hibernia Bank & Trust Company and Whitney-Central National Bank be made garnishees herein and be required to answer under oath and in writing the interrogatories annexed to this petition.

Wherefore, the premises and annexed affidavit considered, petitioner prays that a writ of attachment issue herein upon petitioner furnishing bond with a good and solvent surety, in the amount fixed by law and  
8           conditioned as the law required, commanding the Civil Sheriff of the Parish of Orleans to seize and attach according to law, property of said Armour & Company, defendant within the jurisdiction of this Court, and to hold the same subject to the further order of this Court and to the judgment to be hereinafter rendered herein; that the New Orleans National Bank, the Commercial National Bank, the Hibernia Bank & Trust Company, and the Whitney Central National Bank be made garnishees herein and ordered to answer the annexed interrogatories, according to law; that the said Armour & Company be duly cited to appear and answer this petition and that, after due proceedings had, there be judgment in favor of petitioner and against

said Armour & Company for the full sum of Thirty five Thousand Eight Hundred Five and 50/100 Dollars (\$35,805.50), with legal interest thereon from the 30th day of November, 1917, until paid, and all costs of suit, that the writ of attachment herein be maintained and that petitioner's lien and privilege resulting from the attachment and garnishment herein on all the property and debts herein attached and garnished be recognized and enforced; that said property or debts be sold and that petitioner's claim, interest and costs be paid by preference and priority over all other creditors of said Armour and Company out of the proceeds of said sale.

Petitioner further prays for all general and equitable relief.

(Signed) TERRIBERRY, RICE & YOUNG,  
Attorneys for Petitioner.

9 State of Louisiana,  
Parish of Orleans.

Before me, the undersigned authority, personally came and appeared Oscar R. Whilden, who after being by me first duly sworn, according to law, deposes and says:

That he is the President of the Central-American Cattle Company, Inc., petitioner; that he has read the foregoing petition and all of the facts and allegations therein contained are true and correct.

(Signed) OSAR R. WHILDEN.

Sworn to and subscribed before me this 26th day of December, 1917, at New Orleans.

(Signed) W. W. YOUNG,  
(Seal) Notary Public.

## ORDER.

Let a writ of attachment issue herein as prayed for, upon petitioner giving bond, with good and solvent surety and conditioned as the law directs.

Let New Orleans National Bank, Commercial National Bank, Hibernia Bank & Trust Company and Whitney-Central National Bank be made and duly cited as garnishees herein, and ordered to answer the accompanying interrogatories under oath, categorically and in writing within ten days from service thereof, and as the law directs.

New Orleans, December 24th, 1917.

(Signed) E. K. SKINNER, Judge.

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10 United States of America, District Court of  
the United States, Eastern District of  
Louisiana, New Orleans Division.

Clerk's Office:.

I certify the foregoing to be a true copy of the original record in this office.

Witness my hand, and the seal of the said Court, at New Orleans, La. this 21st day of February A. D. 1924.

H. J. CARTER, Clerk.

H. W. NIEHUES,

(Seal)

Deputy Clerk, U. S. District  
Court, Eastern District of  
Louisiana

## IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 4148

ARMOUR &amp; COMPANY.

versus

FORT MORGAN STEAMSHIP CO., LTD., et als.

ARGUMENT AND SUBMISSION—March 12, 1924

On this day this cause was called, and, after argument by John D. Grace, Esq., for appellant, and Victor Leovy, Esq., and W. W. Young, Esq., for appellees, was submitted to the Court.

## IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

Appeal from the District Court of the United States for the Eastern  
District of Louisiana

OPINION—Filed March 18, 1924

John D. Grace and M. A. Grace, (John D. Grace, M. A. Grace, and Edwin H. Grace on the Brief), for appellant.

Geo. H. Terriberry, Frazier L. Rice, W. W. Young, Jos. M. Rault, Walter Carroll, Geo. Denegre, Victor Leovy and Henry H. Chaffe, for Appellees.

Before Walker and Bryan, Circuit Judges, and Call, District Judge

WALKER, Circuit Judge:

The appellant, Armour & Company, a corporation, libeled the steamship Fort Morgan, claiming that it was liable for loss due to the injury and death of some of a lot of 420 head of cattle shipped by appellant on that vessel at Port Limon, Costa Rica, to be delivered at Jacksonville, Florida, the injury and death of such cattle being attributed to the alleged unseaworthy condition of the vessel when it started on the voyage. The basis of the asserted claim against the vessel was a bill of lading for the cattle issued to the appellant. That instrument was made by filling out a printed form used by the United Fruit Company, the following words being added thereto: "Wherever United Fruit Company appears, read: The Central American Cattle Co., Inc." Under the heading in that instrument, "Shippers Description of Goods," was the following: "Quantities—500. Class and Contents of Packages—(Five Hundred) Head Live Steers (More or less)." In the space immediately below the just quoted words was



the following: "80 not shipped. Tho. Johannesen, Master." Following the last quoted words were stipulations of the bill of lading, which concluded as follows:

"In witness whereof, the United Fruit Company, by its agent has signed — Bills of Lading exclusive of non-negotiable copies, all of the same tenor and date, one of which being accomplished the other stand void.

Dated at Limon, C. R., Nov. 28, 1917.

No. —.

(Signed) The Central American Cattle Co., Inc., by Tho. Johannesen, Master S/S Fort Morgan."

The bill of lading is to be considered in the light of the following facts, which were disclosed: On October 3, 1917, the appellant and the Central American Cattle Company, a Louisiana corporation, (herein called the Cattle Company), entered into a written contract which contained provisions to the following effect: The Cattle Company agreed to procure cattle in named Central American countries, to bring such cattle to Port Limon, or such other port as may be agreed upon by the parties, to charter and equip one or two steamers for carrying such cattle, and to transport them to Jacksonville, Florida, at a stated rate of ocean freight per head; ocean freight to be payable in New Orleans upon appellant's receipt of cable advice from its representative at the port of loading of the number of head loaded on steamer; Cattle Company to take care of cattle during voyage under supervision of supercargo appointed by appellant. Prior to the shipment in question the Fort Morgan, with full complement of officers, seamen, engineers and firemen, was chartered by its owner to the Cattle Company for the period of twelve months, and at the time of the shipment in question was being operated under the orders and directions of the Cattle Company as charterer. The charter party provided for the charterers paying for the use of the vessel a stated lump sum per calendar month. It contained the following:

"That the owners shall provide and pay for all provisions, wages and consular shipping and discharging fees of Captain, officers, engineers, firemen and crew; shall pay for the insurance of the vessel, also for all engine-room and deck stores, and maintain her in a thoroughly efficient state in hull and machinery for and during the services, \* \* \* to be employed in carrying lawful merchandise including petroleum or its products in cases, and passengers so far as accommodations will allow, \* \* \* between any safe port and/or ports in the United States of America and/or West Indies and Gulf of Mexico, and/or Caribbean Sea, and/or Central America (Magdalena River excluded), and/or South America, not south of the River Plate, as the Charterers or their Agents shall direct. \* \* \* That the captain, although appointed by the Owners, shall be under the orders and direction of the Charterers as regards employment, agency or other arrangements; and the Charterers hereby agree to indemnify the Owners from all consequences or liabilities that may

arise from the captain signing bills of lading or otherwise complying with their orders and directions."

As above shown, the bill of lading was subscribed by the Cattle Company only, "By Tho. Johannesen, Master S/S 'Fort Morgan.'" That signature indicated the absence of intention to bind anyone but the charterer by the bill of lading. The act of the master in so subscribing the instrument does not indicate a purpose thereby to bind the ship or its owner. The instrument as a whole being so signed, it cannot well be inferred that the master, in signing the above quoted statement in the space in the body of the instrument immediately below the statement under the heading "Shipper's Description of Goods," did so in a capacity different from that in which he signed the instrument as a whole, or that he intended thereby to make the bill of lading binding on the ship or its owners. His signature in the space mentioned evidently had reference only to the immediately preceding statement, which served the purpose of disclosing the exact number of cattle shipped. It is not to be inferred that it was intended to have reference to the contract obligations expressed by the instrument as a whole. The circumstances under which the bill of lading was issued, as well as its terms, indicate that it was not contemplated that the shipment in question would give rise to a liability in favor of the appellant of any one other than the Cattle Company. Before the cattle were received on board the ship the Cattle Company was under a contract obligation to appellant to transport the cattle from Port Limon to Jacksonville—to render the service as carrier called for by the bill of lading; and the appellant was aware that the service was to be rendered by the Cattle Company using for that purpose a vessel or vessels chartered by it, and operated under its orders and directions. We are of opinion that the circumstances attending the shipment—including the bill of lading purporting to bind the charterer alone, and the pre-existing contract between the shipper and the charterer—require the conclusion that the appellant's contract for the carriage of the cattle was with the charterer alone, and not with the ship or its owners. The appellant is not entitled to hold the ship or its owner liable for a breach of a duty imposed by the contract for the carriage of the cattle, as appellant's contract for such carriage was with the charterer, the Cattle Company, alone. *Wagstaff vs. Anderson*, Law Reports, 5 C. P. D. 171, 180; *The Posnan*, 276 Fed. 418; *Carver on Carriage of Goods by Sea* (6th Ed.), §158. Nothing in the terms of the charter party indicates that it was contemplated that the ship or its owner could be made liable for a breach of a contract of affreightment made by a shipper with the charterer.

We conclude that the Court did not err in rejecting the claim asserted by the libel. Grounds other than those above mentioned are urged in argument in support of the just stated conclusion. It is unnecessary to consider or pass on such other grounds. The decree is affirmed.

## IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

JUDGMENT—Filed March 18th, 1924

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause, be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellant, Armour & Company, and the surety on the appeal bond herein, National Surety Company of New York, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

## IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

## PETITION FOR REHEARING

Armour & Company, appellant in the above entitled and numbered cause, prays this Honorable Court will rehear and reconsider the matters decided by this Court on the 18th day of March, 1924, and cause an order or orders to be made herein, revoking and recalling the decree made in this cause on said day, and that this Honorable Court will render judgment herein, reversing the judgment of the lower court and award such measure of damage to appellant as shall be fair and just.

The grounds of this application are:

## First

The Court erred, and is in conflict with repeated decisions of the United States Circuit Court of Appeals for the Second Circuit (213 Fed. Rep. 20-21; 272 Fed. Rep. 266), in holding that a bill of lading signed by the master of the ship for the charterer of the ship, for lawful cargo received on board belonging to a third person, to be transported in that ship to a designated destination between ports covered in the charter party, does not impose any obligation upon the ship enforceable in rem in favor of the owners of those goods, even for damages occasioned those goods after the voyage has commenced by reason of unseaworthiness of the ship, existing prior to and at the commencement of, and during the said voyage. This action by libellant being in rem only, against a personified entity, upon whom legal obligations are imposed.

## Second

The Court erred and is in direct conflict with repeated decisions of the United States Circuit Court of Appeals for the Second Circuit (213 Fed. Rep. 20-21; 272 Fed. 266) in holding that:

"The appellant is not entitled to hold the ship or its owner liable for a breach of a duty imposed by the contract for the carriage of the cattle, as appellants' contract for such carriage was with the charterer, the Cattle Company, alone,"

where the action is against the ship, alone warranted by her charter party as tight, staunch, strong, etc., brought on the sole and exclusive ground that she was grossly unseaworthy; a condition shown to have existed even prior to the commencement of the voyage, and where the damage complained of was occasioned within a few hours after the vessel had left port enroute on her stipulated voyage with appellants' cattle on board, under a bill of lading signed by the master of said vessel, as such, for the charterers, and the unseaworthiness of this vessel necessitated her return to the port of departure after a few hours at sea because her instability, which caused her, while loading and while under way on said voyage, to continually and gradually keel over to one side to such an extent that she was on the verge of capsizing when she got back to port.

## Third

The Court erred, and is in direct conflict with repeated decisions of the United States Circuit Court of Appeals for the Second Circuit (213 Fed. Rep. 20-21; 272 Fed. Rep. 266) in holding that where a third party contracts to transport lawful merchandise in a vessel chartered by him but manned by her owners, where those goods are received on board in good order and condition in such ship, all as evidenced by bill of lading signed by the master of said vessel, as such, for the charterer, under a charter party which provides for indemnity to ship owners for losses arising from the master signing bills of lading as presented to him by the charterer, to the prejudice of the charter, that the owner of such merchandise is without right to proceed against the ship for damage, even though sustained by such cargo after the voyage commenced and the ship had left port, although such damage was occasioned solely by grave unseaworthiness of said vessel, existing before and at the time of the departure of said vessel upon the voyage undertaken by her, and the right to recover damages is pitched upon the unseaworthiness of said vessel existing before and at the time of, and after the commencement of said voyage.

Petitioner files herewith, under same cover, its brief in support of this application; and for the reasons hereinabove set forth and amplified in the brief, respectfully submits that, in the interest of a uniform admiralty and maritime jurisprudence especially on such a vital question, a rehearing should be granted.

The premises considered, petitioner prays that after due consideration a rehearing be granted in this case, and that, finally, the judgment of the United States District Court for the Eastern District of Louisiana be set aside and commensurate damages allowed to appellant.

And for general and equitable relief.

John D. Grace, M. A. Grace, Edwin H. Grace, Proctors for Appellant.

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CERTIFICATE

I certify that in my opinion the above and foregoing petition for a rehearing is well founded in law, and that it is not filed for the purpose of delay.

John D. Grace, Proctor.

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IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER DENYING REHEARING—May 28, 1924

It is ordered by the Court that the petition for rehearing filed in this cause, be, and the same is hereby, denied.

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IN UNITED STATES CIRCUIT COURT OF APPEALS

CLERK'S CERTIFICATE

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 469 to 480 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court numbered 4148, wherein Armour and Company is appellant, and Fort Morgan Steamship Company, Ltd., et als., are appellees, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 467 are identical with the printed record and the supplemental record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this fourth day of June, A. D. 1924.

Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal of United States Circuit Court of Appeals, Fifth Circuit.)

## SUPREME COURT OF THE UNITED STATES

On Petition for Writ of Certiorari to the United States Circuit Court  
of Appeals for the Fifth Circuit

ORDER GRANTING PETITION FOR CERTIORARI—October 20, 1924

On consideration of the petition for a writ of certiorari herein to the United States Circuit Court of Appeals for the Fifth Circuit, and of the argument of counsel thereupon had, it is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

(5584)

## INDEX.

	Page
Notice of application for writ certiorari.....	1
Petition for writ certiorari showing irreconcilable conflict between the Circuit Court of Appeals for the Fifth Circuit and the Circuit Court of Appeals for the Second Circuit, on the question of rights of shipper holding char- ter's bill of lading for damage to goods shipped on board of a common carrier in a grossly unseaworthy condition, operated by her owners, through their own employees, the master, officers and crew of such vessel.....	3-9
The Fifth Circuit holding herein that in such a case a libel against the vessel will not lie.....	6-7
The Second Circuit after an elaborate discussion of the case, citing and quoting from many authorities showing a uniform construction and application of law, holding that in just such cases a libel against the vessel will lie .....	6-7-8
Brief .....	11-25
Statement of admitted facts concerning shipment, amount of loss and how happening vessel lacked sufficient ballast to enable her to be safely navigated.....	11-12-13
While loading and after putting to sea down to her return to port a few hours after depar- ture she was gradually listing over, "little by little," until finally on returning to port was listed to forty-five degrees and on verge of capsizing.....	12-13

## II

	Page
<b>The Law of the Case</b> .....	13-24
Court of Appeals in this cause held that vessel could not be held for a breach of duty imposed by the contract for the carriage of the cattle, notwithstanding this breach was the grave unseaworthiness of the vessel, because appellant had a written contract with the charter for the carriage of these goods.....	13
Court of Appeals for Second Circuit in repeated decisions which were submitted to Circuit Court of Appeals for Fifth Circuit, but which court refused to follow them, holds, after elaborate review of the law, that no matter with whom the contract for carriage is made, the ship, as a personified entity is liable for damages occasioned by her unseaworthiness and unfitness to carry out the voyage undertaken.....	14-16
Extract from decision in Olsen v. United States Shipping Company, 213 Fed. Rep., pp. 20-21, determined in the Circuit Court of Appeals for the Second Circuit by Judges Lacombe, Ward and Rogers.....	18-20
Extract from decision in The Esrom, 272 Fed. Rep., par. 1, p. 269, determined in the Circuit Court of Appeals for the Second Circuit, by Judges Ward, Hough and Manton—a comprehensive review of the law with many citations and numerous quotations.....	20-24
The foregoing cases were cited and quoted at same length as in this brief on application to Circuit Court of Appeals for Fifth Circuit, but without effect.	
<b>Certificate</b> .....	25

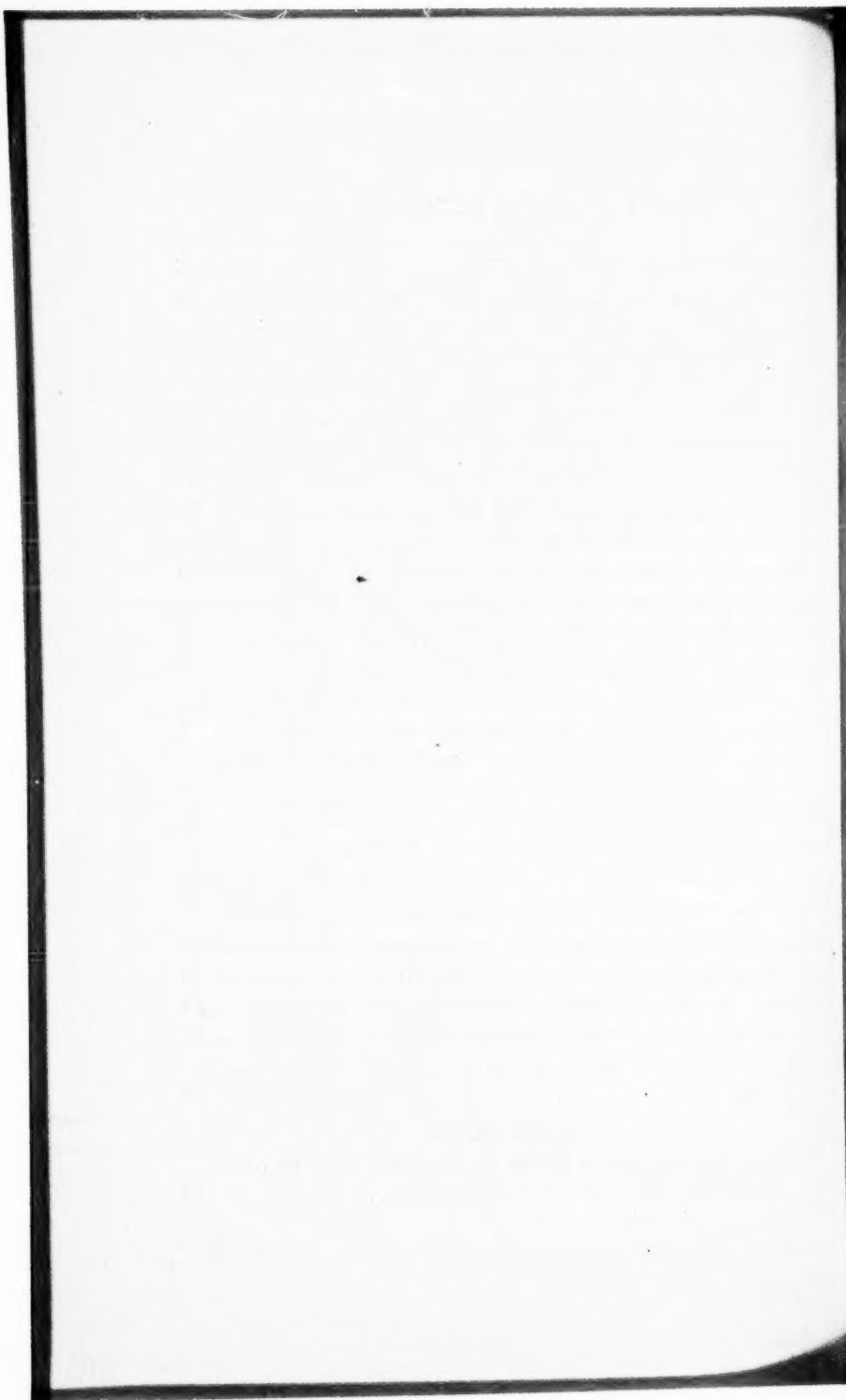


## LIST OF CASES REFERRED TO.

	Page
Ada The (D. C.) 233 Fed. 325.....	24
Bird of Paradise, 72 U. S. (5 Wall.), 545, 18 L. Ed. 662	23
Brower vs. Water Witch, Fed. Case 1971, Affirmed 66	
U. S. (1 Black) 494, 17 Law Ed. 155.....	20
Bulkley vs. Naumkeag Co., 62 U. S. (24 How. 386, L. Ed.	
599) .....	23
Centurion The (D. C.) 57 Fed. Rep. 412 (c.).....	15-18-21
Delaware The 14 Wall 579.....	22
Eugene Viesta (D. C.) 28 Fed. 762.....	23
Esrom The 272 Fed. Rep. 269.....	6-14-16-20
Euripides 52 Fed. 161.....	15-20
Franklin Lady The 75, U. S. (8 Wall.), 325, 19 L. Ed. 455	23
Freda The 266 Fed. Rep. 551 (c.).....	16
Freeman The vs. Buckingham, 18 How. 182.....	21
Lawrence vs. Minturn, 17 How. 100, 15 Law. Ed. 58.....	18
Mayra vs. Cordes, 21 How. 7.....	21
National Steam Nav. Co., Ltd., vs. International Paper	
Co., 241 Fed. Rep. 862, 154 C. C. A. 565.....	23
Niagara vs. Corders, 21 How. 7.....	21
Olsen vs. United States Shipping Co., 213 Fed.,	
p. 18-20-21.....	7-14-17
Poznan The 276 Fed. Rep. p. 432.....	14-15-24
Saturnas, 250 Fed. Rep. 407.....	16-23
Scott vs. Ira Chaffee (D. C.) 2 Fed. 401.....	16-23
Sprott The (D. C.) 70 Fed. 327.....	21
Tornado, 108 U. S. 342, 2 Sup. Ct. 746, 27 L. Ed. 747.....	23
Vanderwater vs. Mills, 60 U. S. (19 How.) 15 Law.	
Ed. 554.....	23

## TEXT BOOK.

Carver on Carriage of Goods by Sea (6th Ed.) Sec. 158	
and Sec. 17.....	16



IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

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No. 537

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ARMOUR AND COMPANY,

Petitioners,

*versus*

FORT MORGAN STEAMSHIP COMPANY,  
CLAIMANTS

STEAMSHIP "FORT MORGAN," ET AL.,

Respondents.

---

Sirs :

Please Take Notice :

That upon a certified copy of the transcript of record herein, and upon the annexed petition of Armour and Company, I shall move before the Supreme Court of the United States, at the Capitol, in the City of Washington, on Monday, October sixth, 1924, at the opening of court on that day, or as soon thereafter as counsel can be heard, for a writ of *certiorari*, to be directed to the United States Circuit Court of Appeals for the Fifth Circuit, to bring before the above named Honorable Court the action referred to in said petition, for such proceeding therein as

to the said Supreme Court of the United States shall deem just.

Dated at New Orleans, July 10, 1924.

Yours respectfully,

JOHN D. GRACE,  
of counsel for Petitioner.

JOHN D. & M. A. GRACE.

To:

DENEGRE, LEOVY AND CHAFFE,  
Proctors for the Fort Morgan Steamship Company.

TERRIBERRY, RICE AND YOUNG,  
Proctors for Central American Cattle Company.

Service accepted and copy of foregoing notice and petition for writ acknowledged this July 10th, 1924.

DENEGRE, LEOVY AND CHAFFE,  
Proctors for the Fort Morgan Steamship Company.

TERRIBERRY, RICE AND YOUNG,  
Proctors for Central American Cattle Company.

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

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No. 537

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ARMOUR AND COMPANY,

Petitioners,

*versus*

STEAMSHIP "FORT MORGAN"—FORT MORGAN  
STEAMSHIP COMPANY, CLAIMANTS

Respondents.

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PETITION FOR WRIT OF CERTIORARI.

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*To the Honorables, the Justices of the Supreme Court of  
the United States:*

The petition of Armour & Company, a corporation organized and existing under the laws of the State of Illinois, for a writ of *certiorari*, requiring the United States Circuit Court of Appeals for the Fifth Circuit to certify to the Supreme Court of the United States for its review and determination, the case of *Armour & Company v. Steamship "Fort Morgan,"* whereof the Fort Morgan Steamship Company is claimant as owner.

**RESPECTFULLY REPRESENTS:**

**FIRST:** That the sole question involved in this cause—a question of law—is one upon which the Circuit Court of Appeals for the Fifth Circuit is, in its judgment of the law, radically at variance with the judgment of the law of other Circuit Courts of Appeal, on the question of legal effect of bills of lading signed by the master of ocean going ships for the charterer, as will be presently shown. A question of prime importance to carriers by water and shippers on water craft employed in foreign and domestic commerce.

**SECOND:** The question presented is whether or not liability attaches to an ocean going passenger and freight ship for loss occasioned by crushing and smothering to death one-half of her cargo of cattle which were all shipped in good order and condition, on board of such steamship, which vessel was expressly warranted by her owners to be tight, staunch, strong, well equipped and seaworthy; which cargo of cattle was shipped under a received on board bill of lading, signed by the master of the ship, for the charterers of that ship, with said master and all her officers and crew being then and there the employees and agents of the owner of the ship; which ship, it is conclusively shown was not in fact in a seaworthy condition even while lying at her dock receiving on board said cattle; she being then and there radically deficient in necessary ballast and with part of her water ballast tanks damaged and unfit for use. So, by reason of said unseaworthiness and while at her loading dock, she commenced a slow gradual

list over to one side; which list became more marked when she lurched over several degrees more on the letting go of her mooring lines, which secured her to the dock, which list kept steadily turning the vessel over on her side, until finally, when at sea after a few hours sailing from port, she had listed, or turned over so far to one side her officers and crew refused to proceed further on the voyage, fearing for their lives. They turned the ship back to the port she had just left, and, on arriving there she was sounding signals of distress, a call for help, as she had so far listed over, she was then on the verge of capsizing, or completely turning over. Because of this most extraordinary list, which was due to grave unseaworthiness of the vessel, due to insufficient ballast and unserviceable water ballast tanks, the cattle stowed down in the hold of this ship were unable to maintain their footing, slipped to the decks, and there, over one-half of this cargo of 420 heads of cattle, were crushed, smothered to death, and jettisoned. This throwing of the dead cattle overboard, was not caused by a sea peril, but by the unseaworthy instability of the ship herself, caused through lack of sufficient ballast.

Nevertheless, the Circuit Court of Appeals for the Fifth Circuit, holds that the ship is not liable for any loss to the shippers of said cattle.

But other Circuit Courts of Appeal, and foreign and American authorities, as will be presently shown, hold that under just such circumstances the ship is liable for the full measure of damage.

Hence, in this regrettable conflict, and considering the importance of the question involved, which strikes at the very root of bills of lading, and other contracts for carriage of goods, this application for *certiorari* is presented.

**THIRD:** With all due deference to the Circuit Court of Appeals for the Fifth Circuit, it is respectfully suggested that that court is in error, and in direct conflict with other Circuit Courts of Appeal, as will be presently shown, in holding as follows; to-wit:—

“As above shown, the bill of lading was subscribed by the Cattle Company only, ‘by Tho. Johannsen, **master S/S Fort Morgan.**’ That signature indicated the absence of intention to bind anyone but the charterer by the bill of lading. The act of the master in so subscribing the instrument, does not indicate a purpose thereby to bind the ship or its owner.” (Tr. p. 471.)

But, directly opposed to the above holding, the United States Circuit Court of Appeals for the Second Circuit, with Judges Ward, Hough, and Manton, presiding, in *The Esrom*, 272 Fed. R. p. 269, after a most learned and exhaustive review of the authorities, says:

“If the voyage is begun, the vessel must carry the goods to destination on the terms agreed by the shipper with the charterer; **for when the vessel starts upon the voyage, by implication, there is a ratification and adoption by the ship of the charterer’s contract with the shipper.**”

“\* \* \* Before sailing, the vessel’s owner is protected by his opportunity to refuse to carry the



goods on the terms agreed by the charterer before the voyage is commenced."

In the last quoted case it is further said:

"The ship may be held liable *in rem* for damages to the cargo even though no bill of lading or contract of affreightment was signed by the master."

FOURTH: That the lower court is in direct conflict with other Circuit Courts of Appeal as will presently be shown, when it holds that:—

"The appellant is not entitled to hold the ship or its owner liable for a breach of duty imposed by the contract for the carriage of the cattle, as appellants' contract for such carriage was with the charterer, the Cattle Company, alone." (Tr. p. 472.)

But that breach of duty referred to by the court was the unseaworthiness of the ship, itself, which was warranted by her owners to be tight, staunch, strong and seaworthy in every respect; a warranty, too, which is implied by law when not expressed.

Respecting this point the United States Circuit Court of Appeals, for the Second Circuit, before Judges Lacombe, Ward and Rogers, presiding, in the case of *Olsen v. United States Shipping Company* (213 Fed. R. pp. 20-21) held:

"It would, in our opinion, be unwise and dangerous to impair the implied warranty of seaworthiness of the ship, herself. The district judge rightly held that the steamer was unseaworthy on leaving Ship Island. The jettison was caused not by sea peril, but by her own instability. It makes no differ-

ence whether this was due to the amount of stowage of the deck load alone, or also to the fact that the largest ballast tank could not be filled. **All these matters were under the absolute control of the master and it was his duty to see that they were right. \* \* \***

Other authorities are submitted in petitioners' brief, which, too, evidence the grave importance to the shipping world, of the question of law submitted herein.

FIFTH: Your petitioners, in accordance with Rule 37 of this Court, have filed a duly certified copy of the record of the said cause.

WHEREFORE, your petitioners respectfully pray that a writ of *certiorari* may issue out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding the said Court to certify and send to your Honorable Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein entitled, *Armour & Company, Appellants v. Fort Morgan Steamship Company, Ltd., et als, Appellees, Claimant, as owner of the steamship "Fort Morgan,"* numbered 4148 of the Docket of said Court, and that the said cause may be reviewed and determined by your Honorable Court, as provided in Section 6 of the Act of Congress, entitled "an act to establish Circuit Courts of Appeal and to define and regulate in certain cases the jurisdiction of the Courts of the United States and for other purposes," approved March 3, 1891, and Section 240 of the Judicial Code; and that your peti-

tioner may have such other or further relief or remedy in the premises as to Your Honors may seem appropriate and in conformity with the said act and code, and that the judgment of the said Circuit Court of Appeals in the said case, may be amended and due allowance made by your Honorable Court, to the end that there be no further reason for failure of those having it in their power to aid distressed vessels to withhold that prompt succor, so often necessary in the preservation of human life.

And your petitioners will ever pray.

ARMOUR AND COMPANY,

By Philip D. Armour,

Vice-President Armour & Company.

STATE OF ILLINOIS,  
CITY OF CHICAGO.

Philip D. Armour, being first duly sworn according to law, deposes and says that he is qualified and has authority to act herein for the foregoing petitioners; that he has read over the foregoing petition and that the statements contained therein are true and correct to the best of his knowledge, information and belief. That Armour and Company, is a corporation.

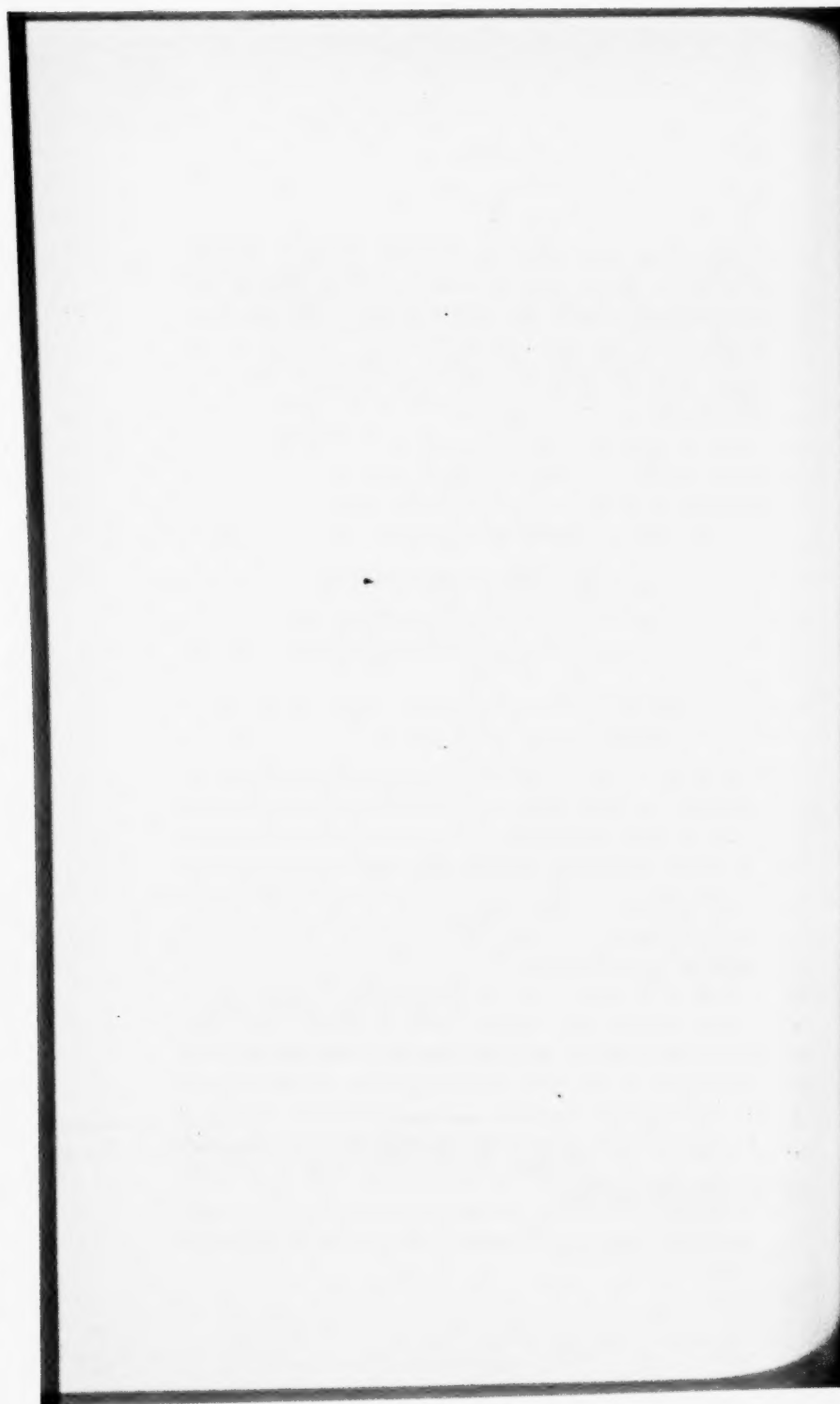
(Seal)

PHILIP D. ARMOUR.

Sworn to and subscribed before me this 8th day of July, 1924.

.....  
Notary Public, Cook County, Illinois.

My commission expires



11

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1924.

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No. 537

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ARMOUR & COMPANY,

Petitioners,

*versus*

STEAMSHIP "FORT MORGAN"—FORT MORGAN  
STEAMSHIP COMPANY,

Claimants-Respondents.

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BRIEF FOR PETITIONERS.

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Petitioners brought this suit solely and exclusively against the steamship "Fort Morgan," a common carrier, on a bill of lading signed by the master of that ship (Tr. pp. 29 and 30), which acknowledges receipt on board, at Port Limon, Costa Rica, of 420 head of live cattle, shipped by petitioner in good order and condition (Tr. p. 9), to be delivered in like good order and condition unto petitioner, at Jacksonville, Florida.

This suit was brought to recover of and from the said steamship "Fort Morgan," alone, the sum of \$31,500.00 for and on account of death and damage happening on shipboard to said consignment, within a few hours after the departure of said steamship from said port, occasioned solely by reason of the gross unseaworthy condition of said vessel because of lack of sufficient ballast to safely navigate her.

Due to lack of necessary ballast and consequent instability of this vessel, she had a list of thirteen degrees when her mooring lines were let go (Tr. p. 396). As she proceeded on her voyage this list kept gradually increasing, as her master, Thom. Johannesen, says, "little by little" (Tr. 267), until after a few hours out from port she had so far listed to port her officers and crew refused to proceed any further, insisting that she be brought back to port (Tr. p. 281), which was done.

Concerning her condition when she arrived back at port of loading, sounding distress signals, her master, Thom. Johannesen, testified as follows (Tr. p. 276) :

Q. When your vessel got back to Port Limon, what was the degree of list she had?

A. **Forty-five.**

Q. Then she was practically at the point of capsizing, wasn't she?

A. Yes, she could not stand no more. That is why we turned back.

This gross unseaworthy condition of that ship prevented the cattle from keeping on their feet, so they slid to the

deck and were crushed, causing the death of 218 head and grave injury to others which entailed heavy costs and expenses in caring for them at and in the neighborhood of the port of shipment, for recovery of all of said losses, this suit is brought.

### THE LAW OF THE CASE

#### Showing a Decisive Marked Conflict Between the Circuit Court of Appeals for the Fifth Circuit and That of the Second Circuit and Other Courts.

Notwithstanding the foregoing, unparalleled unseaworthy condition of the steamship "Fort Morgan" before and at the time she entered upon her proposed voyage, which is admitted by the master of that ship, and otherwise abundantly proven, the lower courts dismissed petitioner's claim.

The Court of Appeals held herein as follows:

"The appellant (petitioner herein) is not entitled to hold the ship or its owner liable for **a breach of duty** imposed by the contract for the carriage of the cattle, as appellant's contract for such carriage was with the charterer, the Cattle Company, alone," (Tr. p. 472).

Notwithstanding the fact that the "breach of duty" above referred to was a gross breach of duty by the carrier of obligations arising out of the mere fact that cargo is received on board for transportation, from which fact, alone, the law imposes upon the ship, the obligation of seaworthiness.

In the case of *Olsen v. United States Shipping Company*, 213 Fed. Rep., pp. 20-21, before the United States Circuit Court of Appeals, for the second circuit, with Circuit Judges Lacombe, Ward and Rogers presiding, the court pointed out that,

"It would, in our opinion, be unwise and dangerous to impair the implied warranty of seaworthiness of the ship herself."

In *The Esrom*, 272 Fed. Rep., par. 1, p. 272, before the United States Circuit Court of Appeals for the second circuit, with Circuit Judges Ward, Hough and Manton, sitting, the court said:

"The obligations which are created one to the other, then, are that the ship is bound not to injure the merchandise by improper stowage or rough handling, and, if she does, then there will be a liability in rem. even before the voyage is begun. If the voyage is begun, the vessel must carry the goods to destination on the terms agreed by the shipper with the charterer; for when the vessel starts upon the voyage, by implication, there is a ratification and adoption by the ship of the charterer's contract with the shipper."

The Circuit Court of Appeals for the fifth circuit, seeking support for its interpretation of the law, did, we submit, with all due deference, erroneously cite the case of *The Poznan*, 276 Fed. Rep. 432, (U. S. D. C.) since, in that case, it is a fact not only that no complaint whatever was urged against or found with the seaworthiness of that ship, but that question was in no way involved.



It appears in the case of the "Poznan" (cited erroneously by the C. C. A. for the 5th circuit) that, at the instance of her owners, the voyage of that vessel was broken up and she required to return to her port of loading—not because of any inability on the part of that vessel to proceed upon the voyage undertaken—as did exist in the case of the steamship "Fort Morgan"—but because her owners alleged they feared that due to the congested condition of the harbor of Havana, Cuba, at that time, to which port she was then bound, she would be held up an unreasonable length of time before she could get opportunity to discharge her cargo.

In the said case (Poznan) the court was called upon to determine what were the rights of holders of bills of lading signed by the charter alone; and here is what the court said (276 Fed. R. 432, before Judge Hand) :

**"(12) The last question is of the parties liable. First, of the ship.** The charter party did not provide that the master should sign the bills of lading; that clause in the printed form being struck out. By an addendum, it provided that the Acme Company should issue no bill of lading until the freight had been paid to the Polish Company. Thus the charter party clearly contemplated bills of lading running in the name of the Acme Company, and they all so read. Most of them were in fact signed by the Company, but a few by the master. So far as concerns the ship, it makes no difference. Being once laden she was bound for right delivery though the charterers sign. *The Euripides* (D. C.) 52 Fed. 161; *The Centurion* (D. C.) 57 Fed. 412;

*The Freda* (D. C.) 266 Fed. 551. In *The Esrom* (No. 2) 272 Fed. 266 (C. C. A. 2nd), February 24, 1921, it was agreed by all the judges that the charterer's bill of lading bound the ship for right delivery. Indeed, the cargo would have a 'privilege' against the ship for right delivery, even without any bill of lading. *The Saturnus*, 250 Fed. 407, 162 C. C. A. 477, 3 A. L. R. 1187."

We respectfully submit that what is said in *The Poznan*, unequivocally fastens liability upon the ship, even in cases where the bill of lading be signed by the charterer, alone; and, in no way, manner, shape or form does it afford authority for the finding of the Circuit Court of Appeals in this case, although quoted by them in that erroneous belief.

So, also, the Circuit Court of Appeals in this case cite, as affording support for their interpretation of the law, Carver on Carriage of Goods by Sea (6th ed.), Sec. 158. While the author states the shipper, in such a case as that mentioned by him (which is not analogous with the petitioner's herein), must proceed against the charter, that author further says, in the very same section: "Though they might be able to proceed against the shipowner for acts done improperly by the master" (Citations). However, this proceeding *in rem* is not affected by proceedings *in personam*.

But, in this very same edition of Carver on Carriage of Goods by Sea, in Sec. 17, that author says:

"And further, the shipowner remains responsible for loss or damage to the goods, however caused,

**if the ship was not in a seaworthy condition when she commenced her voyage, and the loss would not have arisen but for that unseaworthiness."**

So, we submit, with all due deference to the Circuit Court of Appeals, for the fifth circuit, their decision in this case stands without support from any authority, and is against the very citations given by them in support thereof.

Then, too, petitioner's suit is one *in rem.* against the steamship "Fort Morgan" to recover of and from that ship, alone, because of her own gross unseaworthiness due to her instability because of insufficient ballast. Whereof the master of that ship has testified (Tr. p. 293) :

**"IF THE SHIP HAD BEEN STRAIGHT WHEN LOADED THERE WOULD HAVE BEEN NO DANGER."**

For the convenience of the court we set out here the two cases determined in the Circuit Court of Appeals for the second circuit, heard by different judges sitting on that court, making **five** judges concurring in the following case, which show an exhaustive review of the law on the points in question on which the second circuit is in **direct conflict** with the Circuit Court of Appeals for the fifth circuit. They are as follows:

#### **AUTHORITIES ABOVE REFERRED TO.**

**In the case of *Olsen v. United States Shipping Company*, 213 Fed. Rep., pp. 20-21, before the United States**

Circuit Court of Appeals, for the second circuit, with Circuit Judge Lacombe, Ward and Rogers presiding, the court held:

"The consignee of the cargo at Aberdeen sued the ship owners for the value of the cargo jettisoned, who, in pursuance of correct legal advice, paid the claim. The District Judge allowed all these claims of the owners on the ground that they resulted from the improper loading, which was done by the charterer and which the charterer insisted did not affect the steamer's seaworthiness. This was, in our opinion, error. It is true that when charterers load cargo against the protest of the master, in such a way that it is itself damaged and/or damages other cargo the charterer will be liable. *The Centurion* (D. C.), 57 Fed. 412. Likewise, when cargo loaded on deck by agreement is lost because of a peril of the sea the ship will be excused. *Lawrence v. Minturn*, 17 How. 100, 15 L. Ed. 58. We are not willing to extend this to such a loading as makes the ship herself unseaworthy when no peril is encountered. It would, in our opinion, be unwise and dangerous to impair the implied warranty of seaworthiness of the ship herself. The District Judge rightly held that the steamer was unseaworthy on leaving Ship Island. The jettison was caused not by sea peril, but by her own instability. It makes no difference whether this was due to the amount of the stowage of the deckload alone or also to the fact that the largest ballast tank could not be filled. All these matters were under the absolute control of the master and it was his duty to see that they were right. It was no excuse to him that the charterers did the loading; insisted upon his taking

the deckload or that surveyors certified that the ship could do so safely. No doubt both thought so. That, however, did not lessen his duty, especially in view of the fact that he did not think so himself.

"The owners seek to sustain the decree on various grounds. They say that the warranty of seaworthiness was satisfied if the ship was seaworthy when the voyage began, which they say was at New Orleans, as she certainly was. **If this be admitted, it will be no excuse to the owners if the master subsequently made or allowed others to make the vessel unseaworthy.**

"Then they rely on such analogies as landsmen requiring builders or manufacturers with whom they contract to use certain material or follow certain construction which results in loss. Such relations have no resemblance to the relation of vessel and cargo or to the supreme authority of the master of a ship. There is no such warranty as that of seaworthiness and the builder or manufacturer has no such absolute authority or duty as has the master of a vessel.

"They rely also on Article 30 of the charter providing that the deckload shall be at the charterer's entire risk, **but this does not cover a risk caused by the unseaworthiness of the vessel.**

"Then they say that clause 9 in which the charterers indemnify the owners against any liability arising from the bill of lading entitles the owner to recover. But the bill of lading did not increase the liability of the owners under the charter party. Indeed, it restricted it. **The cargo did not belong to the charterers, and if it did, the owner's liabil-**

ity for unseaworthiness would be exactly the same.

"Finally, cases are cited in which charterers were owners *pro hac vice*, and therefore could not reclaim because of unseaworthiness caused by themselves. Obviously these have no application."

In *The Esrom*, 272 Fed. Rep., par. numbered 1, p. 269, before the United States Circuit Court of Appeals for the second circuit, with Circuit Judges Ward, Hough and Manton sitting, the Court said:

"The ship may be held liable *in rem.* for damages to the cargo, even though no bill of lading or contract of affreightment was signed by the master. A shipowner may be held to the common-law liability. In *Brower v. Water Witch*, Fed. Cas. No. 1971, affirmed 66 U. S. (1 Black), 494, 17 L. Ed. 155, it was held that where a shipment of cotton was damaged, even if no bill of lading or other agreement was entered into by the master, the receipt of the merchandise, by the vessel consenting to its being loaded for a port of destination, subjected the ship to liability; that the agents of the charterers in whose services the brig was at the time, and who were interested in procuring cargoes, and who entered into an agreement fixing the terms upon which the shipment was to be made, made the vessel bound by such agreement. The obligation is imposed as a common-law obligation of the carrier. In *The Euripides* (D. C.), 52 Fed. 161, it was said:

"But the liability of the ship would be the same without any bill of lading. The original charterers undertook to transport these goods; this was done by the authority and consent of the shipowners, for such

was the very object of the charter. The ship is therefore answerable for any negligence that causes damage to the goods, and is answerable to the shipper, or to his vendee, upon the implied contract to transfer safely, whether a bill of lading is issued or not.'

"In the *Centurion* (D. C.), 57 Fed. 412, Judge Brown said:

" 'The charter includes nothing that even by implication excludes the ordinary security of a lien in favor of the cargo against the ship for the performance of the ship's duties in the business for which she was chartered. The ship is therefore liable for bad stowage, because the duty to stow properly is one of the duties of the carriage which the owner has expressly authorized. The *Freeman v. Buckingham*, 18 How. 182; *Niagara v. Cordes*, 21 How. 7. The ship is liable for damages from bad stowage, whether the stowage is done by the owners' agent or the charterers', and equally so whether there is any bill of lading or not. It was therefore immaterial whether the bill of lading was signed by the master or by the charterers.'

"In the case of *The Sprott* (D. C.), 70 Fed. 327, a steamer was held *in rem.* for damages to cargo which was carried on deck although the bills of lading were signed by the charterer. It was there said:

" 'I do not think it is any defense to the ship that the bill of lading signed by the master recited the shipment of all the cargo as having been made by the charterers. The ship is not entitled to claim from that circumstance that it was dealing with the charterers alone, and had no privity with the actual shippers. For the master knew to the contrary. His own bill of lading recited the actual shippers, and he knew that the usual bill of lading had been given to those shippers on the ship's account. To suffer the ship, therefore, to deny any privity with the actual known shippers, under cover of a single bill of lading given to the charterers as sole shipper, would be to

uphold a mere subterfuge, and a virtual fraud upon the shippers; since the ship's bills of lading were given to shippers with the master's knowledge and concurrence, and on his account. The master, knowing that clean bills of lading had been given for the 163 bales, knew that the charterers had no authority to ship them on deck at shipper's risk. His own bill of lading to the charterers, with that exception inserted, is therefore, no protection to him or to the ship; and if he repudiates the bill of lading signed in his behalf by the charterers, as respects goods other than the charterers' goods, he is in the situation of a master who has received goods for transportation without giving any bill of lading for them at all; and upon that theory he would be bound to carry the goods in the customary manner; that is, under deck. *The Delaware*, 14 Wall. 579.'

**"If negligence were proved, or fault shown, the *Esrom* would be responsible to the libellant independent of the form of contract of affreightment, or even though the bill of lading was not signed by the master.**

"There were reciprocal liens between the *Esrom* and the cargo of prunes, which arose at the time the cargo was received on board and obligations were then imposed. In *Vandewater v. Mills*, 60 U. S. (19 How.) 82, 15 L. Ed. 554, it was said:

"'But this duty of the vessel, to the performance of which the law binds her by hypothecation, is to deliver the cargo at the time and place stipulated in the bill of lading or charter party, without injury or deterioration. If the cargo be not placed on board, it is not bound to the vessel, and the vessel cannot be in default for the non-delivery, in good order, of goods never received on board.'

**"But the obligation between the ship and cargo is mutual and reciprocal, and does not attach until**



the cargo is on board or in the custody of the master. *The Lady Franklin*, 75 U. S. (8 Wall.), 325, 19 L. Ed. 455; *Scott v. Ira Chaffee* (D. C.), 2 Fed. 401. This rule is not inconsistent with the authorities cited, which hold that the vessel's lien upon the cargo is subject to be defeated if, before the vessel breaks ground, she becomes unseaworthy or disabled and unable to finish her voyage. *Tornado*, 108 U. S. 342, 2 Sup. Ct. 746, 27 L. Ed. 747; *Eugene Viesta* (D. C.), 28 Fed. 762. But the lien of the vessel upon the goods and of the goods upon the vessel attaches from the moment the goods are laden on board, and not from the time only when the ship breaks ground. *Bird of Paradise*, 72 U. S. (5 Wall.), 545, 18 L. Ed. 662; *Bulkley v. Naumkeag Co.*, 65 U. S. (24 How.), 386, 16 L. Ed. 599.

"This Court said in *National Steam Nav. Co., Ltd., vs. International Paper Co.*, 241 Fed. 862, 154 C. C. A. 565:

"The obligation of the ship to carry, and of the shipper to pay for the carriage, accrues when the goods are delivered to the ship."

"The obligations which are created one to the other, then, are that the ship is bound not to injure the merchandise by improper stowage or rough handling, and, if she does, then there will be a liability *in rem.* even before the voyage is begun. If the voyage is begun, the vessel must carry the goods to destination on the terms agreed by the shipper with the charterer; for when the vessel starts upon the voyage, by implication, there is a ratification and adoption by the ship of the charterer's contract with the shipper. Then the shipper is deprived of an opportunity to retake

his goods, and the goods are in the sole possession and control of the ship. So, too, the ship is then bound by the charterer's bill of lading, under which the freight is prepaid, and cannot collect further freight at destination. *The Ada* (D. C.), 233 Fed. 325. Before sailing, the vessel owner is protected by his opportunity to refuse to carry the goods on the terms agreed by the charterer before the voyage is commenced."

Judge Ward filed a dissenting opinion in the above case, contending that the ship's liability was even greater than that announced in the majority opinion. So, as stated in *The Poznan* (276 Fed. R., par. 12, p. 432),

**"it was agreed by all the judges that the CHARTERER'S BILL OF LADING BOUND THE SHIP."**

In the foregoing case application for writ of *certiorari* was made to the Honorable the United States Supreme Court, and writ denied, 257 U. S. 634; 66 L. Ed. 408.

No matter what further citations we might set out here, it would not be possible to strengthen the already strong, decisive, unequivocal declarations contained in the above quoted decisions of the United States Circuit Court of Appeals for the second circuit, which refuse to permit common carriers of passengers and merchandise, by water, to evade their just liability in placing in service vessels in such an unseaworthy condition as to prove a grave menace to human life and property, and justly hold the ship responsible *in rem.* for its own instability, weakness and

vices, rendering her unseaworthy and unfit for the voyage undertaken.

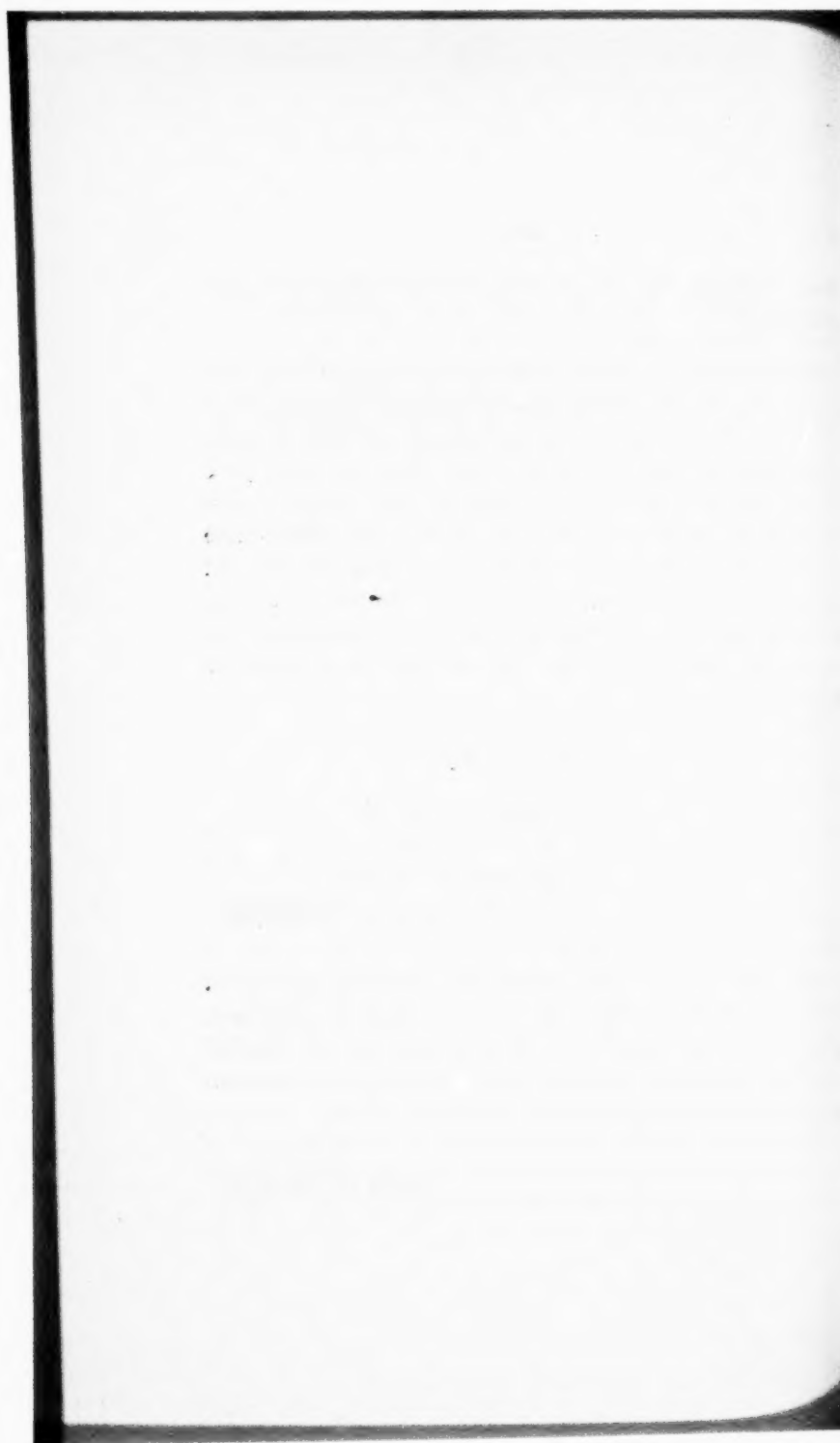
Because of the manifest importance of a correct settled rule of law, in view of the directly opposed holdings of the Circuit Courts of Appeal for the second and fifth circuits, a determinate definite uniform rule, such as only your Honors can establish, we pray your Honors to grant a writ of *certiorari*, as by the petition prayed for, that shippers and carriers by water may know their just rights and obligations when unseaworthy vessels are put in service to undertake a transportation service for which they are absolutely unfit, operating to the serious damage of shippers.

Respectfully submitted,

JOHN D. GRACE,  
M. A. GRACE,  
EDWIN H. GRACE,  
Attorneys for Petitioners.

I hereby certify that I have examined the petition in this cause, and am familiar with the facts in this case, and that in my opinion the said petition is well founded and that the cause is one in which the prayer of the petition should be granted by this Honorable Court.

JOHN D. GRACE.



(13)

Office Supreme Court,

FILED

DEC 28 1925

WM. R. STANLEY

IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1925.

No. ~~134~~ 135

ARMOUR & COMPANY,

Petitioners,

*versus*

FORT MORGAN STEAMSHIP COMPANY, LTD.,  
(CLAIMANTS AS OWNERS OF THE STEAM-  
SHIP "FORT MORGAN"); THE AMERI-  
CAN SURETY COMPANY OF NEW  
YORK; AND THE CENTRAL  
AMERICAN CATTLE CO.,

Defendants.

On Writ of Certiorari to the United States Circuit  
Court of Appeals, for the Fifth Circuit, from their  
Final Judgment Rendered March 18, 1924,  
Affirming the Judgment of the  
Lower Court.

JOHN D., M. A. & EDWIN H. GRACE,  
Attorneys for Petitioners.



## SUBJECT INDEX.

### *Parties to the Suit.*

Page.

Although five different persons or corporations are named in the record there are only three parties to the suit: Libelant, Armour & Company; the steamship "Fort Morgan" with the Fort Morgan Steamship Company, claimant thereof, and the Central American Cattle Company, Inc. .... 2-5

### *Statement of Facts.*

The primary question presented is whether or not liability attaches to an ocean-going passenger and freight steamship for loss occasioned by the crushing and smothering to death of one-half of her cargo of cattle, because of a condition of gross unseaworthiness existing in that vessel prior to and at the time of the commencement of her voyage..... 5-6

The Fort Morgan Steamship Company, Inc., admit the shipment of the cattle at the port and for the destination stated by libelant; admit a listed condition of the ship at the dock while taking on cargo; admit a continual list of this ship, to such extent, that within a few hours after leaving port the voyage was abandoned and vessel returned, blowing signals of distress and in a situation of grave danger of turning over; but they contend that the Central American Cattle Company, Inc., was responsible for this condition, and brought them in by petition and prayed for judgment over against that company if libelant should prevail. They also contend, without reason, that

## II. *Subject Index (Continued)*

	Page.
the shipper, too, was responsible for the condition of that vessel .....	7-8
The Central American Cattle Company, Inc., called in by claimant of the S/S "Fort Morgan," as co-defendant, admits the shipment of the cattle by Armour & Company; admits the unseaworthy condition of that ship and admits the crushing, killing and maiming of the greater part of the cargo shipped by libelant. They admit they were charterers of the ship, but deny that they were responsible for any of the damages, and deny that they should be made responsible over to the owners of the ship .....	9-10
<i>Pleadings and Evidence.</i>	
The facts in the case as disclosed in the pleading and evidence are discussed under different headings, as follows:	
<i>The Bill of Lading.</i>	
The bill of lading provides for the carrier's responsibility, as a carrier to attach when the goods are actually loaded for transportation. .	10-11
It was only after such loading libelant's shipment of cattle was damaged as complained of. The bill of lading was executed by the Master of the steamship "Fort Morgan" after he personally had received and counted the number of heads of cattle delivered on shipboard. . . .	11
Authority of the Master to execute bills of lading, as required by the charterer, is specially provided for in the charter. ....	12
The bill of lading contains all the usual stipulations and conditions ordinarily found in the	



*Subject Index (Continued)*

III.  
Page.

usual form issued by common carriers. Respondent invoked agreement in bill of lading relating to subrogation of insurance on cargo; but as the loss arose from unseaworthiness, only, of the "*Fort Morgan*", and no insurance was effected on such character of loss, none became payable .....12-13

The bill of lading refers to a live stock agreement—Principal matters which are set out in the live stock agreement.....14-15

*The Charter Party Under Which the Steamship Fort Morgan Was Operated and Special Orders to the Master Thereon.*

The charter party was made in a common form of charter party, and it provides that the owners shall appoint and pay the captain, officers and crew of the vessel, also for all engine room and deck stores and their insurance, and to maintain her in a thoroughly efficient state.....15-16

It still further provides that the vessel shall be employed in carrying lawful merchandise, including petroleum or its products, in cases, and passengers, so far as accommodations will allow ..... 16

That the Captain, although appointed by the owners, shall be under the orders and direction of the charterers as regards employment, agency or other arrangements; and that the charterers are bound to indemnify the owners from all consequences or liability that may arise from the Captain signing bills of lading, or otherwise complying with their orders or directions....16-17

IV.                      *Subject Index (Continued)*

Page.

With regard to ports between which this vessel could be engaged to ply it provides for employment between safe ports of the United States of America, West Indies, Gulf of Mexico, Carribean Sea, Central or South America, "as the charterers or their agents shall direct" . . . 17

*Master's Instructions From Owners In Re Following Charterer's Orders.*

The Master testified he had instructions from the owners to follow the *Central American Cattle Co., Inc.*, orders. This testimony was given in the presence of the President of the corporation owning the "*Fort Morgan*," Mr. Burge, who subsequently took the stand and did not deny this testimony. . . . . 17

*The Unseaworthiness of the S/S "Fort Morgan" at the Time When She Received Libelant's Goods For Sea Transportation and the Cause of Such Unseaworthiness.*

The libel alleges, and the answers of the Fort Morgan Steamship Company, Ltd., and the Central American Cattle Co., Inc., admit that when the "*Fort Morgan*" commenced her voyage she had a list, which subsequently increased, until within a short time thereafter her voyage was abandoned and she put back to port sounding signals of distress, calling for help, and in a condition which threatend to capsize the vessel, she then having a list of forty-five degrees . . . . . 18

# *Subject Index (Continued)*

V  
Page.

The Master of the "Fort Morgan" (Johannesen) testified "if the ship had been straight when loaded there would have been no danger".... 19

Libelant's agent, Mitchell, asked the Captain about the list the "Fort Morgan" had while that vessel was being loaded and was assured the list did not amount to anything and that the vessel would straighten up when she got out to sea.....19-20

Testimony of the Master that from the time the "Fort Morgan" left her dock until she returned she was continually going over gradually to port, and shortly thereafter returned with a list of about forty-five degrees on the verge of capsizing ..... 20

## *Cause of Unseaworthy Condition of the S/S "Fort Morgan."*

The S/S "Fort Morgan," by her charter, was represented to be a water ballast ship (but, as shown hereafter, her tanks were not in good order or vessel with necessary water ballast to make her seaworthy)..... 20

The libel alleges that even before the S/S "Fort Morgan" commenced her voyage, as well as at the time of the commencement thereof, her forepeak tank was empty, that other tanks (ballast tanks) could be only partly filled because of leaky condition therein, that the after-peak tank was empty, not in condition to be used for water. That water for boiler use, and for use of cattle, as well as for ship's general use, was taken from water ballast tanks,

# VI. Subject Index (Continued)

	Page.
reducing the weight of water carried below the ship's water line.....	21
The Central American Cattle Co., Inc., admitted all the foregoing averment in the libel as being true .....	21-22
Fort Morgan Steamship Company admitted them in part and in part denied the averments (discussed at page 26).....	22
<i>Surveyor's Report on Unseaworthiness of the S/S Fort Morgan.</i>	
Underwriters Surveyors' report on the condition and availability of the water tanks of the "Fort Morgan" and the cause for the instability and unseaworthiness of the S/S "Fort Morgan" is set out in full at.....	22-26
The surveyors refer to important information furnished them by the Chief Officer and the Chief Engineer of the S/S "Fort Morgan," which shows unseaworthiness in said vessel..	24
The Fort Morgan Steamship Company insisted that the forepeak tank referred to in the libel was a small tank built into the ship for the purpose of supplying the boiler, and that it was properly used for that purpose; and that the afterpeak tank could have been filled but was not used, and that failure to use it was of no importance .....	26
But the surveyors in their report, above referred to, state that while the capacity of the forepeak tank and of the afterpeak tank amounted to thirty-five tons of water, they further report that the condition of the tanks, according to	

*Subject Index (Continued)*

VII.  
Page.

statements of the Chief Officer and Chief Engineer of that vessel, was, when she sailed, as follows: "Forepeak tank empty, afterpeak tank empty, not in condition to be used for water" .....26-27

Neither the ship's Engineer or Chief Officer were ever called by respondents as witnesses in this case and no good or sufficient reason given for the absence thereof..... 27

The Master, alone, was the only witness produced of all the officers and crew of that vessel ..... 27

The Master admitted that the boiler water used for steam purpose was taken out of the bottom tanks—the ballast tanks. That water used to water the cattle was also taken from the ballast tanks, thus depleting her ballast. So, it is just as the Master of the steamship "Fort Morgan" testified: "If the ship had been straight when loaded there would have been no danger"....27-28

The Captain's testimony is quoted, showing that in taking water out of the ballast tanks, whether for boiler or steaming purposes, or for watering the cattle, that this was a taking out of ballast weight from the bottom of the ship; and the more weight taken from the bottom of the ship, the more tender she becomes and the more liable she is to roll over..... 28

That he knew it was his business to keep the vessel straight ..... 29

Radiograms offered in evidence by libelant, which passed between the President of the owners of

VIII. *Subject Index (Continued)*

Page.

the steamship "Fort Morgan" at New Orleans, and the Master of the S/S "Fort Morgan," lying at Port Limon, wherein the president of the owning company inquired: "Advise if cattle properly loaded, also what caused accident and when will sail." That the Master responded "all cattle properly loaded, disaster caused by ballast tanks and heavy seas." The alleged heavy sea a myth, but, at most, would be only a concurrent cause. . . . . 29

*The Fort Morgan Steamship Company Failed to Produce the Ship's Official Log or Her Deck Scrap Log, or Her Engineer's Log.*

The Master admitted he could see the sea from his landing as long as it was daylight or twilight, that he was looking down on the beach and on the key, "But I couldn't notice anything more—anything serious" . . . . . 30

It is not pretended that any unusual or even ordinary storm or bad weather prevailed, but it is urged that a ground swell, coupled with lack of sufficient water ballast, caused the heavy listing of the ship. Libelants deny that there was any unusual ground swell, anything more than what is to be always experienced along the seashore, and submit that the alleged ground swell, at most, is put forward only as a concurrent cause—the other cause being unseaworthiness of the ship due to lack of sufficient water ballast resulting from leaky and unsuitable condition of some of the tanks and the taking out of her water ballast for steaming purposes and the watering of the cattle in her cargo. . . . . 30-32

Although no one of the different logs kept on the S/S "Fort Morgan" were produced it appears from a superficial survey report made at New Orleans that the surveyor had access to the ship's official log, and quoting therefrom in his report, says, that while this vessel lay at the wharf at Port Limon she had a list to port of seven degrees. After letting go moorings she listed over to thirteen degrees. When she got outside of Port Limon in a heavy swell she listed over to thirty-eight degrees and the Master considering the danger returned to Port Limon. The Master admitted that on her return to port she had a list of forty-five degrees and was on the verge of capsizing (Tr., p. 276) 31-32

On trip from New Orleans to Port Limon, going for the cattle in question, sixty tons of water was used from double bottom tanks—water ballast tanks ..... 32

Not only did the Fort Morgan Steamship Company fail to produce the Chief Officer and/or the Chief Engineer who volunteered the information set out in the official survey held at Port Limon, a copy of which was served on the Master within a few days of the time after the disaster, but the Master of the steamship testifying nearly a year and a half after the disaster stated he did not know where the engineer was—"He may be on the ship yet, I can't say" ..... 33-34

And the statement of one of the proctors for libellant that they had made efforts to locate these men fails to show what was the nature or char-

X. *Subject Index (Continued)*

Page.

acter of efforts and when and how made, or why it was that the testimony of these men was not secured while those officers were still in the service of that ship. The Court having repeatedly announced its opinion of a litigant who might have taken the testimony of important witnesses, officers and the crew of their vessel and no good or sufficient reason given why it was not taken, we are omitting citations on the point with respect to the inference that may be raised thereby.....

34

*Construction of the Cattle Fittings. By Whom Made and Their Sufficiency.*

At the instance, and by the efforts of the Fort Morgan Steamship Company, there was brought into this case a contract which had been entered into between Armour & Company and the Central American Cattle Company. But that contract specifically provides that the Central American Cattle Company would attend to the suitable equipment of the steamers, which they would furnish for the ocean transportation of libelant's cattle, all of which was to be done by and at the sole cost, charge and expense of the said American Cattle Company, Inc., to the full satisfaction of the Master of the ship and such insurance representatives who might be concerned.....34-35

In the Fourth Article of the libel it is specifically alleged that the said cattle were all safely placed on board of said vessel; were properly stowed and tied to make the voyage without danger to them, and would have safely made



*Subject Index (Continued)*

**XI.**

**Page.**

the same voyage but for the unseaworthy condition of the said vessel..... 35

The Central American Cattle Company, Inc., brought in as a co-defendant by the Fort Morgan Steamship Company, in their answer to this Article, admit that, "The allegations of the Fourth Article of the libel are admitted to be true" ..... 35

The Fort Morgan Steamship Company deny that the vessel was in an unseaworthy condition, and, although the Master testifies, and his radiograms show, that the cattle were all properly loaded, claimant professed in its answer not to know whether the cattle were properly loaded or not.....35-36

Not only was the ship chartered as a general carrier of goods and merchandise to a cattle company, but on previous occasions operated solely for her owners' account, had carried five hundred fifty heads of cattle (seventy more than she had for libelant), and the Master says that the owners, of course, knew of those services ..... 36

That the ship carried at different times, four cargoes of bananas, a cargo of cattle prior to the last one and several cargoes of corn and hogs on deck to Havana from New Orleans; sugar from Cuban ports and lumber trips with the lumber laden on deck..... 36

It is also shown that the President of the company owning the "Fort Morgan" sent on board or knew that there was delivered on board at

## XII. *Subject Index (Continued)*

Page.

the City of New Orleans a quantity of lumber to be used for constructing the cattle fittings for the particular voyage under consideration, and his wireless to the Master after the disaster occurred was "Advise if cattle properly loaded" ..... 37

In addition thereto stands the Master's uncontradicted testimony given in the presence of the President of the Company owning the "Fort Morgan," who succeeded the Master as a witness, stating that he was advised by the said ship owners to follow the Central American Cattle Company, Inc., orders. All of which libelant respectfully submits most conclusively shows that the contention of the Fort Morgan Steamship Company that the ship was not intended to carry cattle is without merit. .... 37

Notwithstanding averments of the Fort Morgan Steamship Company that libelant was obligated to and participated in the construction of the cattle fittings there is not in this record any credible testimony which justifies any such declaration. But the cattle pens were not only properly constructed, but were erected with the approval, sanction and actual participation therein of the Master of the steamship. . 38

Testimony of Captain Johannesen, Master of the steamship "Fort Morgan" is set out at a material length in this brief, which shows that he looked after everything in respect to the cattle fittings, which he deemed necessary for the safety of the ship. That he would not permit anything to be done that he thought would not

*Subject Index (Continued)*

XIII.

Page.

be safe or proper. That what was done met with his approval, that he approved the way these cattle pens were built and approved of the way the cattle were loaded on board. That any changes he wanted made, and any change he wanted done, no matter what it was, they were always willing and ready to do it as he wanted. . . . . 38-39

The Master of the steamship "Fort Morgan" admitted that he reported to the Port Captain, at Port Limon, that the cattle was properly stowed and tied to make the voyage without any danger . . . . . 39

Mr. Edward Mitchell, Agent for libellant at Port Limon, testifies that Armour & Company did not through him, nor through anyone else, supervise, direct or exercise any control over the putting up of the fittings. That a Mr. Wilkerson, whose services would begin as supercargo when the "Fort Morgan" would leave on the voyage accepted employment under the Central American Cattle Company, to aid in constructing these fittings because of the scarcity of labor, but that Armour & Company had nothing whatever to do therewith. . . . . 40

However the testimony fully and completely shows that the fittings were properly constructed, that the Master saw to it that they did not interfere with the safety of the ship and that they were just as useful for the purpose of stowing the cattle as dunnage would be for stowing other cargo with the intention of keeping the cargo in its place and preventing any shifting thereof. . . . . 41

XIV. *Subject Index (Continued)*

Page.

*Measure of Damages.*

- The American Cattle Company entered into two severable, distinct obligations which were set out in a certain contract. Under the terms thereof the cattle company agreed to sell and deliver F. O. B. the steamship certain description of cattle at five cents per pound; libelant to have its representative there to accept the said cattle F. O. B. the steamer. On this particular occasion libelant's agent, Mr. Mitchell, issued a written receipt and accepted from the Cattle Company the four hundred twenty (420) head of cattle F. O. B. the steamer "Fort Morgan," weighing three hundred forty-six thousand three hundred two (346,302) lbs..... 41
- The American Consul's health certificate shows that on the same day Mitchell, as agent for Armour & Company, made affidavit that Armour & Company were the owners of said cattle ..... 42
- The bill of lading issued to libelant stipulates that the carrier will not be liable for more than the invoice value of the goods..... 42
- Mr. Kirk, one of the attorneys of a legal staff of Armour & Company, having personal knowledge of the money paid out by libelant, testified that as a result of the disaster complained of, Armour & Company has actually paid out on account of the cattle loaded on the steamer after allowing credit for the fifty that were saved, the sum of seventeen thousand fifty-one dollars and ninety cents (\$17,051.91)..... 42

*Subject Index (Continued)*

XV.  
Page.

That the actual expenditures by Armour & Company on account of those four hundred twenty head of cattle above mentioned does not include any expense by their men in Central America or any other expenses at all other than what libelant actually paid the Central American Cattle Company ..... 42

The measure of damages sustained by libelant and how arrived at are set out at.....43-44

After the "Fort Morgan" returned and had for the purpose of saving herself, as much as anything else, discharged live cattle and had jet-tisoned over two hundred head of cattle. The live cattle was taken charge of by the Port Captain "for the account of whom it might concern," as the ship had voluntarily broken up its own voyage and failed to deliver the cattle as required ..... 45

As there was no one else to aid in the matter, the Central American Cattle Company and Armour & Company furnished the money to purchase supplies, secured labor and use of pastures. The expenses incurred therein as far as kept by libelant, are set out..... 43

The libel sets up a claim for the market value of such cattle at Jacksonville, Fla., but in computing the damages herein they have taken, as stipulated in the bill of lading, the invoice value F. O. B. the steamer at Port Limon.... 45

So, also, through error, arising from assumption by counsel that the freight had been paid, freight money at the rate of twenty-five dol-

XVI. *Subject Index (Continued)*

Page.

lars per head is claimed in the libel. But, as a matter of fact, the freight has not been paid and, therefore, claim therefor is not pressed. . . 45

It appears that in arranging settlement for the value of the cattle and considering certain other advantages Armour & Company paid to the Central American Cattle Company nineteen thousand dollars (\$19,000.00). But the claim against the steamship "Fort Morgan" sought in this action, is for the invoice price, the liability stipulated in the bill of lading which puts up seventeen thousand three hundred fifty dollars (\$17,350.00) . . . . . 46

*In Re Respondent's Contention That Because of the Existence of a Contract Between Armour & Company and the Central American Cattle Company, Stipulating for Two Distinct, Separate, Severable Obligations, One of Which Was Purely and Simply for Sale of Cattle F. O. B. a Steamer, the Other of Which Was Purely and Simply for the Ocean Transportation of Such Cattle as Vendee's Property, and Providing for Vendee to Make Payment of Ocean Freight; That Such a Contract Bars This Suit, in Admiralty, Although Brought, Not on That Contract, But on a Bill of Lading Issued to Libelant at the Port of Laden as a Shipper of Said Cattle Destined for Delivery to Libelant at Jacksonville, Fla., a Bill Which Was Executed by the Master of the Ship on Shipboard, and on Shipboard Delivered to Libelant's Agent.*

Libelant submits that the long-settled law, a few leading cases of which is cited in this brief,

conclusively shows that the libelant is not barred from proceeding directly against the ship, notwithstanding the fact that the charterer, too, may have stipulated for ocean transportation. That the acceptance of the cattle on board by the Master of the ship and undertaking to transport them did then and there create a liability on the part of the ship, which stands separate and distinct from any contract that the charterer may have made, with citation of authority.....47-51

Respecting the further contention by the Fort Morgan Steamship Company that a settlement of a certain suit brought by the Central American Cattle Company against libelant, to secure payment of the agreed price of the cattle shipped F.O.B. that steamer, etc., and making of a contract between the parties for further business, should bar this suit against the steamship "Fort Morgan," even though none of the rights, titles, interest or obligations of the steamship "Fort Morgan" were directly or indirectly touched upon, and to which contract the said steamship "Fort Morgan," nor her owners, were in any way necessary or proper parties or privies, is, we respectfully submit, a wholly unwarranted interjection into this case of issues manifestly not belonging to it.....51-52

Further, the Central American Cattle Company, that stands impleaded at the instance of the Fort Morgan Steamship Company, does not plead or set up by way of avoidance, or complain that this new contract referred to did in

XVIII. *Subject Index (Continued)*

Page.

any way directly, or indirectly, relieve it from any obligation that it might owe to the Fort Morgan Steamship Company, whether direct or arising out of a recovery by libelant in this cause ..... 52

*LAW.*

Decisions are submitted of cases, exhaustively considering all leading cases, by the United States Circuit Court of Appeals, which are directly in line with libelant's contention in this cause, and are positively directly opposed to the decision of the Circuit Court of Appeals below, which passed on this case. That those decisions completely show by citation of authorities from this Honorable Court and from other Courts of high jurisdiction that "it would in our opinion be unwise and dangerous to impair the implied warranty of seaworthiness of the ship herself" ..... 54

Have held still further, in case of an unseaworthy condition, that "It makes no difference whether this was due to the amount of the stowage of the deck load alone or also to the fact that the largest ballast tank could not be filled. All these matters were under the absolute control of the Master and it was his duty to see that they were right. It was no excuse to him that the charterers did the loading," etc. .... 54

In the case of the *Esrom*, which is quoted at length in this brief, there is reviewed a great many decisions, including decisions of this Honorable Court. That Circuit Court of Appeals (2nd Circuit), having practically exhausted the law



on the subject, it was determined in that case that the ship may be held liable *in rem* for damages to the cargo, even though no bill of lading or contract of afreightment was signed by the Master. That the obligation is imposed upon the ship by law. That the liability of the ship is the same without any bill of lading. That the charter, in that case (as in this case) includes nothing that even by implication excludes the ordinary security of a lien in favor of the cargo against the ship for the performance of the ship's duties in the business for which she is chartered.....56-57

That it is no defense to the ship that a bill of lading signed by the Master reciting the shipment of all the cargo as having been made by the charterer. That it was still further held that, the obligations which are created, one to the other, then, are that the ship is bound not to injure the merchandise by improper stowage or rough handling and, if she does, then there will be a liability *in rem* even before the voyage is begun. If the voyage is begun the vessel must carry the goods to destination on the terms agreed by the shipper with the charterer; for when the vessel starts upon the voyage by implication, there is a ratification and addition by the ship of the charterer's contract with the shipper.....56-60

In still another cause considered by that Circuit Court of Appeals, the Court said even if a case of improper loading had been made out, it

XX. *Subject Index (Continued)*

Page.

- would only prove that the masters were negligent in permitting the coal to be so loaded, and the owners of the ship would be responsible, as the negligence of their agents (masters) would be imputable to them. It was further held "that the manner of loading was under the absolute control of the master and that it was his duty to see that the cargo was properly loaded, and that it was no excuse to him that the charterers insisted on loading in an improper manner" ..... 61
- Libelant further cites cases of this Honorable Court to show that in a case of a nature similar to this "the burden of proving seaworthiness at the beginning of the voyage rests with the ship owner" ..... 63-66
- We further cite authority to show that where the cause of the consumption of coal or water which may be stowed below the center of gravity that as these things are consumed the tendency to become top heavy increases; hence, that such a practice is dangerous to the lives of those on shipboard as well as to property of third innocent parties ..... 62-63
- In addition to the decisions quoted from at large in this brief of the nature referred to above, libelant quote at length Carver's Carriage of Goods by Sea, with respect to the obligations of the ship and her owners under clauses in the charter party directing that the Master shall sign bills of lading as the charterer may request, etc. .... 67-69

But after all it is an indisputable fact that the cargo was lost solely and exclusively by reason of the unstable, unseaworthy condition of the ship prior to and at the time of the commencement of the voyage. A condition due to the failure of the Master of the ship in his duty to keep the ship in proper seaworthy condition for sailing ..... 69

Finally, under the authorities submitted, it is shown that: "The ship, however, would be answerable for any negligence that caused damage to the cargo after its shipment on board; that is to say, it would be answerable to the shipper upon the implied contract to transport safely, and that there should be no unreasonable delay in commencing and prosecuting the voyage after the cargo had been received by the vessel. 1 Pritch. Adm. Dig., p. 492, Sec. 223; The T. A. Goddard (D. C.), 12 Fed., 174; The Euripides (D. C.), 52 Fed., 161. And 'a person whose goods are transported by contract with a charterer, in a chartered vessel, navigated by her owners, is not limited, in case of loss or injury to his goods, to his remedy against the charterer on the express contract with him, but may directly pursue the vessel or her owners, who have caused the loss. The T. A. Goddard, supra; New Jersey Steam Nav. Co. v. Merchants' Bank (6 How., 344, 12 L. Ed., 465).'" The Hiram, 101 Fed. Rep., 138, at pp. 140-141. See also The Water Witch, 19 How. Pr. 241, affd. in 1 Black, 494; The Peytona, 2 Curt., 21, 27..... 50

## XXII. LIST OF CASES CITED.

	Page.
Ada (The), 233 Fed., 325.....	60
Aktieselskabet Fido v. Lloyd Brasileiro, 288 Fed., 62.....	60
Bird of Paradise, 72 U. S. (5 Wall.), 545, 18 L. Ed., 662.....	59
Bulkley v. Naumkeag Co., 65 U. S. (24 How.), 386, 16 L. Ed., 599.....	59
Centurion (The) (D. C.), 57 Fed., 412..	54-56-61
Cohn v. Davidson, 2 Q. B. Div., 455.....	66
Dalaware (The), 14 Wall., 579.....	58
Esrom (The), 272 Fed. Rep., 266, 271 (C. C. A., 2nd C.).....	55-61
Euripides (The) (D. C.), 52 Fed., 161..	50-56-61
Freda (The), 266 Fed., 551.....	61
Freeman (The) v. Buckingham, 18 How., 182 .....	57
Goddard, T. A. (The) (D. C.), 12 Fed., 174	50
Hiram (The), 101 Fed. Rep., 138, pp. 140- 141 .....	50
International Navigation Company v. Farr & B. Mfg. Co., 181 U. S., 218, 226; 43 L. Ed., 830, 833, 21 Sup. Ct. Rep., 591....	65
Lady Franklin (The), 75 U. S. (8 Wall.), 325, 19 L. Ed., 455.....	59
McCahan Sugar Refining Co. v. Steamship Wildcroft, 201 U. S., 376, 50 L. Ed., 794, 797 .....	63
National Steam Navigation Co., Ltd., v. International Paper Co., 241 Fed., 862, 154 C. C. A., 565.....	59
New Jersey Nav. Co. v. Merchants' Bank (6 How., 344, 12 L. Ed., 465).....	50

*List of Cases Cited.—(Continued).* XXIII.

	Page.
Niagra v. Cordes, 21 How., 7.....	57
Noble, Benjamin (The), 244 Fed. Rep., 95 (C. C. A.).....	66
Olsen v. United States Shipping Company, 213 Fed. Rep., 18 (C. C. A., 2nd C.)....	53-60
Oneida (The), 128 Fed. Rep., 687.....	62
Paytona (The), 2 Curt., 21, 27.....	50
Planter (The), 19 Fed. Cas., No. 11207-A, 807-808 C. C.....	67
Poznan (The), 276 Fed. Rep., Par. 12, p. 432 .....	60
Rebecca (The), 1 Ware, 192.....	66
Saturnas (The), 250 Fed., 407, 162 C. C. A., 477, 3 A. L. R., 1187.....	61
Scott v. Ira Chaffee (D. C.), 2nd Fed., 401	59
Sprott (The) (D. C.), 70 Fed., 327.....	57
Southwark (The), 191 U. S., 1, 24 Sup. Ct., 1, 48 L. Ed.....	62
Summer v. Caswell, 20 Fed. Rep., 249, pp. 251-252 .....	66-67
Tornado, 108 U. S., 342, 2 Sup. Ct., 746, 27 L. Ed., 747.....	59
Vandewater v. Mills, 60 U. S. (19 How.), 82, 15 L. Ed., 554.....	58
Viesta, Eugene (The) (D. C.), 28 Fed., 762	59
Virden, Lizzie W. (The), 19 Blatchf., 340; S. C. 11 Fed., 903.....	66
Work v. Leathers, 97 U. S., 279.....	66
Water Witch (The), 19 How. Pr. 241, affd. in 1 Black, 494, 17 L. Ed., 155.....	50-56
Wildcroft, 201 U. S. 376, 50 L. ed. 794, 797	63

XXIV.

TEXT BOOK AND DIGEST.

	Page.
Carver on Carriage of Goods by Sea (6 Ed., p. 170, Sec. 112) .....	67-68
Kent (3rd) 205 .....	66
McLaughlin Shipping, 405 .....	66
Pritch. Adm. Dig., p. 492, Sec. 233 .....	50

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1925.

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No. 537

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ARMOUR & COMPANY,  
*versus* Petitioners,

FORT MORGAN STEAMSHIP COMPANY, LTD.,  
(CLAIMANTS AS OWNERS OF THE STEAM-  
SHIP "FORT MORGAN"); THE AMERI-  
CAN SURETY COMPANY OF NEW  
YORK; AND THE CENTRAL  
AMERICAN CATTLE CO.,  
Defendants.

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On Writ of Certiorari to the United States Circuit  
Court of Appeals, for the Fifth Circuit, from their  
Final Judgment Rendered March 18, 1924,  
Affirming the Judgment of the  
Lower Court.

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PARTIES TO THE SUIT.

The following preliminary statement will facilitate  
the Court in understanding the interests of the respec-  
tive parties to the suit.

FIRST: THE LIBELANTS: ARMOUR & COMPANY, a corporation, shipper of cattle on the steamship "FORT MORGAN", instituted this suit by filing a libel in admiralty solely and exclusively against that steamship, thus making her defendant as a "personified entity", and seeking to hold her responsible for her own gross unseaworthy condition, which alone resulted in damages to libelant complained of herein.

SECOND: THE SAID STEAMSHIP "FORT MORGAN". As above stated, this vessel, alone, was proceeded against herein by libelant. She was operated as a common carrier. This suit against her is brought on a bill of lading executed by her master for 420 head of cattle received on board, of which cattle, while on board, practically one-half the number were crushed and killed, as a result of the rank unseaworthiness of this vessel.

THIRD: THE FORT MORGAN STEAMSHIP COMPANY, LTD., is claimant herein as owner of the said steamship proceeded against, and, on her behalf they furnished a release bond, took possession of the ship and as such claimants are defending this case in her behalf.

FOURTH: THE GULF COAST PLANTATION COMPANY: This company is not, by any pleadings, directly before the Court; but, in the second article of the answer filed by claimant (the above named Fort Morgan Steamship Company, Ltd.,) it is alleged (Tr., pp. 56-57), that the said steamship was under charter to the Gulf Coast Plantation Company, and by that company was subchartered without authority unto the Central American Cattle Company, Inc., and said



claimants filed, in connection with said answer, a copy of the charter to which they refer. But, libelants established as a fact, by the testimony of Robert T. Burge, President of the Gulf Coast Plantation Company (Tr., pp. 361-362), without contradiction, that the said Gulf Coast Plantation Company held the stock of the Fort Morgan Steamship Company; and that the Gulf Coast Plantation Company was really the owner of the steamship "Fort Morgan." These facts being conclusively established, the pretense set up in the name of the Fort Morgan Steamship Company that the charter of said steamship to the Central American Cattle Company, Inc., was a non-authorized act, was abandoned in the District Court by the Fort Morgan Steamship Company, claimants herein. Hence, in so far as this Court is concerned, the Fort Morgan Steamship Company, Ltd., and the Gulf Coast Plantation Company, may be considered as one and the same party.

FIFTH: THE CENTRAL AMERICAN CATTLE COMPANY, INC.: This company was impleaded herein by the Fort Morgan Steamship Company. The steamship "Fort Morgan" was under charter to it, (See charter, Tr. pp. 70-78), for transportation of passengers and all lawful goods and merchandise, including, also, among other things, provision for quarantine conditions, etc., *if fruit also should be carried*, which was not done in this case. Because of quarantine conditions in respect to the fruit trade, etc., this form of charter is styled "West India Fruit Trade": but it also contains provisions to make it cover transportation of all lawful goods and passengers on voyages between North, Central and

South American ports, as the said charterers may elect. The said Central American Cattle Company, Inc., was impleaded by the Fort Morgan Steamship Company, Ltd., Claimants, who contend that the said Central American Cattle Company made the steamship "Fort Morgan" unseaworthy before her voyage commenced, and in their answer, (Tr. p. 69), pray:—

"\* \* \* that the Central American Cattle Company may be made party defendant to this suit, and such decree rendered as between it and libelants as law and justice may require, and that if any decree whatsoever be rendered in favor of libelants against this respondent, against which it protests, that the same decree, with all costs, interests and expenses of every kind be rendered in respondent's favor as against said Central American Cattle Company, Inc."

SIXTH: The above-mentioned Central American Cattle Company, Inc., not only came into Court and filed answer to claimant's proceedings for a judgment over, against it, etc., and admitted the unseaworthiness of the steamship "Fort Morgan", as claimed by libelant, but denied liability for the damages resulting therefrom. They also filed an intervention wherein they sought to recover back certain charter money payments, collected by the said Fort Morgan Steamship Company, Ltd., when that vessel was, in fact, off charter (Tr., p. 426). This matter was finally settled between the said parties and said intervention stands discontinued (Tr. p. 432).

SEVENTH. Another intervention appears in the record, brought by P. G. Jansen, against the steamship "Fort Morgan", to recover because of certain

services and expenses rendered that vessel (Tr. p. 433). None of those things have anything to do with this case. Moreover, that claim was settled and the said intervention discontinued (Tr. p. 436).

So there are now only *three separate parties* before the Court:—

1. Libelant—Armour & Company.
2. Claimant—The Fort Morgan Steamship Company.
3. Time Charterer—The Central American Cattle Company, Inc., impleaded by Claimants as a co-defendant against whom they seek judgment over.

### STATEMENT OF FACTS.

The primary and all important question involved in this cause—a question of law—is one upon which the Circuit Court of Appeals for the Fifth Circuit is, in its judgment of the law, radically at variance with the judgment of the law of other Circuit Courts of Appeal on the question of legal effect of bills of lading signed by the master of ocean going ships, for the charterer, as will be presently shown.

The question presented is whether or not liability attaches to an ocean-going passenger and freight ship for loss occasioned by the crushing and smothering to death of one-half of her cargo of cattle, which were all shipped in good order and condition, on board of such steamship, a vessel expressly warranted by her owners to be tight, staunch, strong, water-ballasted, well equipped and seaworthy; which cargo of cattle was

shipped by libelant, who was given a bill of lading signed by the master of the ship, for the charterers of that ship. The said master and all her officers and crew being then and there at the time of the acceptance of said cargo on board the said steamship, the employees and agents of the owner and officers and crew of the ship; which ship, it is conclusively shown, was not in fact in a seaworthy condition even while lying at her dock receiving on board said cattle; she being then and there radically deficient in necessary ballast, and with part of her water ballast tanks damaged and unfit for use. So, by reason of said unseaworthiness and while at her loading dock, she commenced a slow, gradual list over to one side; which list became more marked when her mooring lines to the dock were let go, she taking a lurch and going still further over several degrees. This list kept steadily turning the vessel over on her side, until finally, when at sea, after a few hours sailing from port, she had listed, or turned over, so far to one side her officers and crew refused to proceed further on the voyage, fearing for their lives. They then turned the ship back to the port she had just left, and, on arriving there she was sounding signals of distress, a call for help, as she had so far listed over, she was then on the verge of capsizing. Because of this most extraordinary list, which was due to grave unseaworthiness of the vessel, due to insufficient ballast and unserviceable water ballast tanks as will be presently shown, the cattle stowed down in the hold of this ship were unable to maintain their footing, slipped to the decks, and there over one-half of this cargo of 420 heads of cattle were crushed, smothered to death, and jettisoned. This throwing of the dead cattle overboard

was not caused by a sea peril, but by the unseaworthy instability of the ship herself, caused through lack of sufficient ballast.

Nevertheless, the Circuit Court of Appeals for the Fifth Circuit, holds that the ship is not liable for any loss to the shippers of said cattle.

But other Circuit Courts of Appeals and foreign and American authorities, as will be presently shown, hold that under just such circumstances the ship is liable, as a "personified entity", for the full measure of damages occasioned by its own unseaworthiness, no matter who signs the Bill of Lading; no matter for whom it is signed; no matter if a Bill of Lading is issued or not.

The FORT MORGAN STEAMSHIP COMPANY, claimant herein, in its answer, admits the shipment of the cattle at the port and for the destination stated by libelant; admits a listed condition of the ship at the dock, which they urge always existed in this vessel; admits a continual list of this ship to such extent and finally, so far over that within a few hours after leaving port it was necessary to abandon the voyage and bring her back. They admit the crushing and killing of over two hundred (200) head of cattle, on board this vessel on account of that listing. They contend that the charterer was responsible for this unseaworthy condition of the vessel and have impleaded it, the Central American Cattle Company, Inc., as a co-defendant, asking in the first place that the libel be dismissed, but if not dismissed that they have judgment over against the charterer. They contend by a great stretch of imagination that

libelant, a shipper, was even responsible for the unseaworthy condition of the vessel, and on that ground asked that the libel be dismissed. They further contend that a contract existing between the American Cattle Company, Inc., and Armour & Company, under the terms of which the Central American Cattle Company, Inc., was to sell to Armour & Company certain cattle of a specified description F. O. B. such vessel as might be determined upon at Port Limon, Costa Rica, that although the cattle in question was so delivered, on board, inspected by Armour & Company's representative and by such representative accepted as the cattle of Armour & Company, whereby, by reason of which under the expressed terms of said contract, Armour & Company became the sole owners of that cattle, that, nevertheless, because the charterers had stipulated to provide vessels to transport said cattle at a given rate of stipulated ocean freight, subject to exceptions from various perils, that Armour & Company could not, therefore, proceed in admiralty against the steamship "Fort Morgan", the carrier selected, for damages sustained by their own cattle laden on board of that vessel, receipted for by the master of that vessel and lost and damaged solely by reason of the unseaworthiness of that vessel; even though the contract referred to by claimant set out separately two distinct absolutely several agreements, one of which was for the sale of the cattle at a given price to be delivered and accepted on ship board, F. O. B. at port of loading, upon which loading, the purchase price agreed upon at once became payable to the seller and thus ended everything in relation to the contract of sale—the other severable portion of the contract is purely and simply an agreement

to provide ocean transportation at a given rate of ocean freight, etc.

Respondents still further urge that because of a compromise made by and between Armour & Company effecting a settlement of the price that was due and owing from Armour & Company to the American Cattle Company, Inc., upon the actual delivery of the cattle on board of the vessel at Costa Rica, which then and there terminated the contract of sale, and because of settlement made between Armour & Company and the American Cattle Company, Inc., for certain costs, charges and expenses incurred in taking care of bruised and maimed cattle recovered from the ship and taken care of at the instance of the Central American Cattle Company, Inc., that, therefore, the libelant could not hold the steamship "Fort Morgan" responsible upon the undertakings of that ship under its warranty of seaworthiness or obligation to safely transport the libelant's cattle from the said port of loading, Port Limon, to Jacksonville, Fla., notwithstanding the fact that the damages complained of are sued on under the bill of lading signed by the master of the ship for cattle received on board of the vessel which was killed, crushed, maimed or damaged solely and exclusively by reason of the gross unseaworthiness of the vessel itself, a breach of her own warranty and obligations undertaken.

The Central American Cattle Company, Inc., called in by the Fort Morgan Steamship Company as a co-defendant, admitted the allegations made by libelant that the vessel was in an unseaworthy condition at the time she received libelant's cargo on board and was in such unseaworthy condition at the time she



commenced her voyage, as well as before, and that libelant's cargo of cattle was, to a great extent, killed, bruised and maimed, as contended for by libelant; but the said Central American Cattle Company, Inc., contend that they were in no way responsible for damages resulting from the unseaworthiness of that vessel, and, on those grounds, only, ask that they be dismissed from the case. They did not set up, or in any way pretend, that a payment to them of the price agreed upon for the cattle F. O. B. the ship at the port of laden as was previously contracted for, or that the payments by libelant for the care and protection of such cattle, etc., which was recovered, did, in any way, or to any extent, bar libelant from its action against the steamship "Fort Morgan", for a recovery of damages arising out of the unseaworthiness, or fault of that vessel in its own undertaking, for the safe and proper transportation of libelant's cargo; nor do they set up such settlement as a bar to the action of the Fort Morgan Steamship Co., Ltd., against them for judgment over.

## PLEADINGS AND EVIDENCE.

The facts of this case as declared in the pleadings, and as set out in the evidence, will be here discussed under their appropriate headings.

### I.

#### THE BILL OF LADING.

The Bill of Lading sued on herein covers Tr. pp. 9-30, and among other pertinent things it contains the following stipulation in its paragraph 4, Tr. p. 10, to-wit:

*"The carrier's responsibility in respect of the goods as a carrier shall not attach until*



the goods are actually loaded for transportation upon the vessel and shall terminate without notice as soon as the goods leave the vessel's tackles at destination or other place where the carrier is authorized to make delivery or end its responsibility \* \* \*".

It was only after such delivery on ship-board the damages occurred complained of by libellant.

It is in the usual form issued by common carriers; containing all the exceptions, benefits and advantages usually claimed by common carriers, which, by law, they may require. The bill of lading sued on, is, in fact, and in every essential particular a ship's bill of lading. It is not merely a received for shipment bill, but is signed by the master of the ship, as master, for the charterers, for cargo actually laden on board to be delivered by that ship at designated destination.

In the body of the bill of lading where the actual quantity of cargo received is designated, it is signed:

"80 not shipped,

"Thos. Johannesen, Master Steamship  
Fort Morgan",

indicating eighty less than the five hundred mentioned in the body of the bill of lading; and it is signed a second time as follows:

"Central American Cattle Company, by  
Tho. Johannesen, Master S. S. Fort  
Morgan".

The actual execution of this bill of lading by the Master of the steamship "Fort Morgan", was made only after he, the master, of that steamship had actually received on board the said steamship the cattle

so shipped. This bill of lading is one which the United Fruit Company had printed for their own use, hence, the name of that company appears throughout the document (See bill of lading, Tr. pp. 9-30). But there further appears in the said bill of lading a declaration substituting the name of the Central American Cattle Company, Inc., for that of the United Fruit Company, by the following endorsement (Tr. p. 29), to-wit:

“(Wherever United Fruit Company appears, read: The Central American Cattle Company, Inc.)”

In respect to the authority of the Master to execute bills of lading in whatever form the charterer may require the charter party in existence in this case especially stipulates as follows:

“\* \* \* That the Captain, although appointed by the owners, shall be under the orders and directions of the charterers as regards employment, agency or other arrangement; and the charterers hereby agree to indemnify the owners from all consequences or liability that may arise from the Captain signing bills of lading or otherwise complying with their orders or directions.” (Tr. p. 73, sentence 4, Art. 4 of charter).

It is because of the existence of the foregoing stipulation contained in the charter that the claimants have brought in here the said Central American Cattle Company, Inc., charterers, that they, claimants, might recover over from said charterers whatever sum libelants may recover as against them in this cause.

This bill of lading contains all the usual exceptions set out in favor of common carriers in the usual form

of carriers' bills of lading and the defendant, the Fort Morgan Steamship Company, have sought herein the benefit of every exception or agreement which they saw fit to urge for their account; but none of them attach in this particular case because the loss was directly due to gross unseaworthiness of the vessel, and it is that source of damage which alone is complained of.

*In respect to agreement in bill of lading relating to insurance on cargo; which appears at Tr. 25-26, par. 23, and reads as follows:*

"In the case of any loss or damage for which the carriers shall be liable, the carrier shall to the extent of such liability have the full benefit of any insurance *that may have been effected* upon the goods or against said loss or damage, and as well also of any payment to insured by underwriters repayable only out of recovery against the carrier, notwithstanding the underwriters were not obligated to make such payment."

the Fort Morgan Steamship Company, in Article 23, of their answer (Tr., p. 68), claim full benefit of said clause, pleading that they are informed and believe insurance on this cargo was effected. Manifestly, respondents consider themselves parties to that bill of lading, made by their agent, the master of said vessel.

But, as a matter of fact, when the representative of Armour & Company accepted the cattle properly loaded F. O. B. the steamship "Fort Morgan", and issued his receipt therefor, giving therein the number of cattle received and their total weight, which re-

ceipt, under the terms of the contract, did, *ipso facto*, make Armour & Company liable for the agreed price (5c per pound of said given weight), and vested in them ownership of said cattle, Armour & Company took out insurance covering this shipment, but only *against stranding, sinking, burning, fire or collision* (Tr. 166), and have filed in this cause their policies of insurance covering these risks (Exhibits C. 1, C. 2, and C. 3). As the loss was not occasioned by any of the insured risks, no insurance under said policies was collectable.

It is noteworthy\* that claimants of the steamship "Fort Morgan", in anticipation that insurance was effected to cover this loss, were quick to avail themselves of the existence of the aforesaid provision of the bill of lading, which they could only do on a ship's bill of lading to which they were parties or privies. But, after all no insurance was effected against loss arising from unseaworthiness.

The bill of lading contains the following stipulation (Tr. p. 28):

"Freight prepaid as per contract subject to Live Stock Agreement."

In paragraph No. 1 of the bill of lading, it is specially provided that the freight is *adjusted* in consideration of all the terms and provisions of this contract. That is to say, the terms of conditions of the bill of lading.

The ship, being under a lump sum charter to the Central American Cattle Company, Inc., that company stipulated for the freight. The ship getting her lump

sum charter, from the Central American Cattle Co., Inc., whether freight was earned or not.

The Live Stock Agreement above referred to, appears at Tr. pp. 48, 49, 50, and stipulates for room for five hundred (500) head of cattle (more or less) on deck and in the hold of the steamship from port of shipment to Jacksonville, Fla., belonging to Arnour & Company, with necessary water. So, also, the Central American Cattle Company, Inc., to provide food for said cattle and proper persons to attend them.

Then, too, in paragraph number one of the Bill of Lading, with respect to its own terms and conditions, provides (Tr., p. 9), as follows:

"1. The freight is adjusted in consideration of all the terms and provisions of this contract."

## II.

### THE CHARTER PARTY UNDER WHICH THE S. S. "FORT MORGAN" WAS OPERATING; AND SPECIAL ORDERS TO THE MASTER THEREIN.

The charter party concerned in this case covers transcript pages 70-78 inclusive. It was entered into on August 23, 1917, between the Gulf Coast Plantation Company, as owners, to the Central American Cattle Company, Inc.

It is especially provided therein that the said steamship "Fort Morgan" was tight, staunch, strong and in every way fitted for the service, having *water-ballast*, etc. Among other special provisions it stipulates:

"That the owners shall provide and pay for all provisions, wages, and consular ship-

ping and discharging fees of captain, officers, engineers, firemen and crew; shall pay for the insurance of the vessel, also for all engine room and deck stores, and maintain her in a thoroughly efficient state in hull and machinery for and during the services \* \* \* provide for all passengers in the best manner according to their class \* \* ”.

Respecting the trades in which she would be employed, this charter (Tr. p. 71) stipulates:

“\* \* \* *To be employed in carrying lawful merchandise, including petroleum or its products in cases, and passengers so far as accommodations will allow.* \* \* ”

“\* \* \* To victual and provide for all passengers in the best manner, according to their class, charterers paying at the rate of \$2.00 per day for each first class passenger.”

The charterers are obligated to pay \$16,000 lump sum per calendar month. Hence, the charterers are entitled to collect the freight on shipments and passage money.

The charter still further provides:

“That the cargo or cargoes shall be laden and/or discharged with the assistance of the steamer’s crew, and tackle, in any dock or at any wharf or place that the charterers or their agents may direct, provided the steamer can always safely lie afloat at all times of tide. \* \* ”

“*That the captain, although appointed by* THE OWNERS, SHALL BE UNDER THE ORDERS AND DIRECTION OF THE CHARTERERS AS REGARDS EMPLOYMENT, AGENCY OR OTHER ARRANGE-

MENTS; and the charterers hereby agree to indemnify the owners from all consequences or liability that may arise *from the captain signing bills of lading or OTHERWISE* complying with their orders or direction."

With regard to the ports between which this vessel could be engaged under the charter, it specifically provides that she might be employed by the charterer

"Between any safe port and/or ports in the United States of America and West Indies, and Gulf of Mexico, and/or Caribbean Sea, and/or Central America (Magdalena River excluded), and/or South America, not south of the River Platte, as *the charterers or their agents shall direct.*"

The charter, as above indicated, is a commonly used form; that is to say, it takes in lawful trades in general, even to the carrying of petroleum and passengers, with provision respecting the mutual obligations of owners and charterers regarding the use of the vessel, if employed in the fruit trade, etc.

#### MASTER'S INSTRUCTIONS FROM OWNERS OF S. S. FORT MORGAN.

The master testified that he had instructions from the owners to follow the Central American Cattle Company, Inc.'s orders (Tr. p. 236), and on page 252 that Mr. Whilden, President of the Central American Cattle Company, represented the S. S. "Fort Morgan" and owners. This testimony was given by the master in the presence of Mr. Burge, the president of the owners, who succeeded him as a witness, and was not denied.



## III.

## THE UNSEAWORTHINESS OF THE STEAMSHIP "FORT MORGAN" AT THE TIME WHEN SHE RECEIVED LIBELANT'S GOODS FOR SEA TRANSPORTATION AND THE CAUSE OF SUCH UNSEAWORTHINESS.

The libel alleges in substance (Art. 5, Tr. p. 3), that at the time the steamship "Fort Morgan" commenced her voyage she had a list which constantly increased as she moved along on her way to sea, until when only a short distance from port, she had keeled over so far her officers and crew positively refused to proceed further on the voyage, and because of their grave fears for the safety of said vessel and for themselves insisted upon returning to her port of departure. And in Article 6, (Tr. p. 3), libelant further alleges in substance that the ship was put back to Port Limon, and on its approach to and arrival at said port she sounded distress signals, calling for help, being in a condition which threatened to capsize the vessel, she having a list at this time of about thirty-five degrees.

The Central American Cattle Company, Inc., impleaded as a co-defendant, admits (in Arts. 5 and 6, Tr. p. 100), the foregoing allegations of the libel, excepting about refusal of officers and crew to proceed, of which they plead ignorance.

The Fort Morgan Steamship Company, Ltd., admits (in Arts. 5 and 6, Tr. p. 59), the foregoing allegations of the libel.

Then, too, the master of the steamship "Fort Morgan", testifying to the time when his officers and crew



refused to go further with the ship, says (Tho. Johannasen, Tr. p. 281):

"A. Well, if I was refused by everybody of course I couldn't go any further. If you are refused by everybody, and if you couldn't go any further, you have got to stop. They were asked to proceed, but they said no, they couldn't go.

Q. That is the crew?

A. The crew and officers and all."

Another significant fact is testified to by the Master, in respect to the heel, or list of the steamship "Fort Morgan," even before as well as at the time she commenced the voyage. He says (Johannasen, Tr. p. 293):

"If the ship had been straight when loaded, there would have been no danger."

From an extract taken from the ship's log set out in a report filed by claimant (the log was not produced, Tr. p. 396), it appears that while the vessel lay at the wharf she had a list of seven degrees, and after letting go her moorings the vessel listed to thirteen degrees. That on getting outside the harbor she had listed to thirty-eight degrees, and was then brought back to port. On arriving in port, her master testifies, (Johannasen, Tr. p. 276), she was then listed about forty-five degrees.

Mr. Edward J. Mitchell, representative of Armour & Company, libelants, testified (Tr. p. 152), that when the steamship "Fort Morgan" was at Port Limon, before taking on any cargo, she showed a list of some

six or seven degrees. That when the cattle was being loaded she showed a little heavier list, and,

"I spoke to the captain about this list, and he told me it was alright; that she always had that list, but that after she got out to sea and got under way she would right herself." (Mitchell, Tr. p. 152).

The Fort Morgan Steamship Company, Ltd., set up in their answer, just such a representation (Art. 5, Tr. p. 59), as is attributed to the master in the above quoted testimony of Mr. Mitchell. Claimants—the Fort Morgan Steamship Company, Ltd.—called to the stand the master of the ship, and he testified as follows: (Thom. Johanason, Master):

Tr. p. 267:

Q. Well, as they kept on loading the list of vessel kept on increasing to port, didn't it?

A. Yes, a little bit—little by little—  
\* \* \*

Tr. p. 346:

Q. Is it not a fact that in your statement to the Port Captain at Port Limon, you stated that your vessel was listed at the wharf and that *from the time you left the wharf until you got back to Port Limon she was continually going over gradually to port?*

A. Yes, sir.

Tr. p. 276:

Q. When your vessel got back to Port Limon, what was the degree of list she had?

A. Forty-five.

Q. *Then she was practically at the point of capsizing, wasn't she?*

A. Yes, she couldn't stand no more \* \* \*.

## CAUSE OF UNSEAWORTHY CONDITION OF STEAMSHIP "FORT MORGAN".

The steamship "Fort Morgan", is represented by her charter to be a *water-ballast ship*, that is to say, a ship provided with tanks in her bottom, which should carry such weight of water at all times to give the ship stability so she may maintain a safe upright position under all conditions of the sea which might reasonably be expected to be encountered. In other words, this water ballast should at all times be of sufficient weight to give the ship proper weight of water ballast, affording seaworthy stability. In addition to this other tanks, such as the fore and the aft peak tanks are installed to afford water for boiler use, and for all general ship's use of whatever nature.

Libelant alleged in article ninth of its libel (Tr. p. 4), that among various conditions of unseaworthiness of said steamship "Fort Morgan", existing before and at the time of the commencement of said voyage, that

"the fore-peak tank was empty, that number one tank contained not more than fourteen inches of water, and was not filled to capacity because it was in such a leaky condition it would not hold more than fourteen inches of water, although its full capacity was requisite to assist in giving the ship necessary stability to make her seaworthy. The after-peak tank was empty and not in condition to be used for water. The water for boiler use, and for use of cattle as well as for ship's general use, was taken from tanks of said vessel (water-ballast tanks) reducing the weight of water below the ship's water-line."

The Central American Cattle Company, Inc., brought in by the Fort Morgan Steamship Company,

as a co-defendant with it, admits the truth of the foregoing allegations in its answer (Art. 9, Tr. p. 97), wherein it says:

"The allegations of the ninth article of the petition (libel) are true."

The Fort Morgan Steamship Company admitted in part and denied in part these averments, as is hereafter shown.

In this record is found the report which was joined in by *three surveyors*, acting on behalf of Lloyds, who made a survey of the vessel to determine the cause of her condition when she put back to Port Limon. It shows that the listing and nearly complete capsizing of this water-ballasted vessel was due to lack of necessary water ballast, because the two peak water tanks were empty and never had any water in them and others of her tanks, water ballast tanks were not in condition to hold water: while water for steaming purposes and for watering the cattle was taken from her ballast tanks (Tr. pp. 269, 259), there being no other supply available for boiler use or for watering the cattle. And, further, that something like one hundred and fifty tons of coal, for ship's use, was stowed up in the shelter deck. This deck is the upper, or weather deck.

Here is the surveyor's report in full, taken from Tr. pp. 324-327:

"Messrs. United Fruit Company,  
"Port Limon, C. R.

"Pursuant to your instructions in behalf of Wm. Le Lacheur Lyon, Lloyd's Agent in San Jose, Costa Rica, we, the undersigned,

repaired on board the steamship 'Fort Morgan,' of Bergen, Norway, of 1119.93 tons gross, 631.76 net tons, triple expansion engine, 200 nominal horsepower, official signal J.Q.D.C., for the purpose of surveying and reporting to you the cause or causes of her taking a heavy list while on a voyage from this port to Jacksonville, Fla., U. S. A., with a cargo of live steers; her subsequent return to this port in distress, and present seaworthiness.

"No plans are available on board showing tank capacities, etc. The Chief Officer and Chief Engineer state that the tanks have approximately the following capacities:

Fore peak tank.....	23 tons
No. 1 tank.....	35 tons
No. 2 tank, which is subdivided .....	40 tons, that is 20 each side.
No. 3 tank.....	35 tons
After peak tank.....	12 tons

"This ship has no ballast tanks midships under her engines or boilers.

"The following is the condition of the tanks according to statements of the Chief Officer and Chief Engineer, when vessel sailed from this port at 6 P. M. November 29th, 1917:

Fore peak tank.....	Empty.
No. 1 tank.....	Contained 14 inches of water.
No. 2 tank, port side..	About 5 tons of water used out of it.
No. 2 tank, starboard side.....	30 inches of water. Full
No. 3 tank.....	Full.
After peak tank...	Empty, not in condition to be used for water.

"On sounding *we found 14 inches of water* in No. 1 tank, and upon inquiring as to why this tank had not been pumped full, learned from the *Chief Officer and Chief Engineer* that this tank had never been filled to its capacity since they had been in the ship, the Chief Officer and Chief Engineer stating that *they understood it leaked when so filled.*

"*We found* starboard side of No. 2 tank full of water, and port side of this tank *empty.* Chief Engineer reports that when ship took the heavy list they pumped some of the water from the port side of No. 2 into the fore peak tank, and the balance overboard, so as to lighten steamer on port side. We found No. 3 tank with 18 inches of water, Chief Engineer reporting that he had used water from this tank for boilers since putting back from sea.

"We found all bilges dry, with the exception of port, forward hold bilge, which had about 14 inches of water, this probably being due to rain and drainage from holds, as all hatches were open all of the time and during heavy rain.

"We found part of the cattle fittings intact and that the balance had been removed. On investigating with stevedores and crew we learned that the cattle fittings held intact until partly removed by stevedores in order to discharge the live steers at wharf when steamer was heavily listed to port, and in order to dump the dead animals at sea; and partly by crew after completing discharge in cleaning up holds, etc.

"In investigation in regard to bunker coal, we find this vessel had on board two hundred and twenty-five long tons of coal when the loading of cattle at this port was commenced.

Of this amount *about two-thirds was in the shelter deck bunker*, and the balance in the cross bunker which reaches from the shelter deck to the ship's bottom; all evenly divided on both sides. Chief Engineer reports that from time of commencing loading until ship took list and put back for Port Limon, 12 tons of coal were consumed.

"We attribute the cause of the steamer not righting herself after taking a heavy roll, due to insufficient ballast, considering the nature of the cargo and amount of top weight, which consisted of coal in shelter deck bunker and cattle above the shelter deck.

"We consider the ship is now seaworthy while in ballast or if loaded with a heavy cargo which would give her sufficient stability not to require ballast in No. 1 tank. Before loading a light or movable cargo, or deck load, which would necessitate the use of No. 1 tank for ballast, we recommend that this tank be tested, and if found leaky, as reported, satisfactorily repaired, and re-tested.

"We also recommend that in case of re-loading a similar cargo of cattle, that tanks Nos. 1 and 3 be filled to their capacity and kept so during the entire voyage, and that an additional one hundred tons of ballast be secured in the holds, and that in case tanks Nos. 1 and 3 cannot be filled to their capacity and kept so during the voyage, a further amount of ballast be secured in the holds equal in weight to that of these two tanks when filled with water ballast.

"In case steamer sails from this port without having No. 1 tank tested and repaired if necessary, we recommend that this be done

at the earliest convenience, and especially before loading a dry cargo or one necessitating the use of this tank for ballast.

"Respectfully submitted,

"(Signed)

"Frederick Seekman O. C. 0399016,

"Marine Supt.

"(Signed)

"Ynge Sorensen, O. C.-A-3016,

"Asst. Marine Supt.

"(Signed)

"C. D. Green, S/S. Agent, by appointment from Wm. Le Lacheur Lyon, Lloyd's agent in Costa Rica.

"Given under my hand and seal of office this 3rd day of December, 1917.

"(Signed) Stewart E. McMillin,

"U. S. Consul.

"Port Limon, Costa Rica."

In defense set up by the Fort Morgan Steamship Company, Ltd., in article nine of their answer, to the allegation of the libel, that when this vessel left Port Limon the forepeak tank and the afterpeak tank *were empty*, they say (Tr. 60):

"That the forepeak tank referred to in said article is and was a small tank built into the ship *for the purpose of supplying the boiler and was properly used for that purpose*. That the afterpeak is a small tank and could have been filled, but was not used, and its use would have had no substantial effect."

But the surveyors in their report hereinabove set out state that while the capacity of the forepeak tank would be twenty-three tons of water and of the afterpeak tank would be twelve tons of water, a combined



capacity of thirty-five tons, they report that the condition of the tanks *according to statements of the Chief Officer and Chief Engineer, when the vessel sailed*, was that the:

*"Forepeak tank empty, afterpeak tank empty, not in condition to be used for water."*

Neither the Chief Engineer or Chief Officer were ever called by respondents as witnesses in this case, although the above-quoted official survey was made December 3, 1917 (Tr. p. 324), and a copy thereof was furnished the master of the ship on or before December 8, 1917 (Tr. p. 322).

The master of the vessel (Tr., 269, 270, 271) states that the boiler water, which is for steaming purposes, was carried *in the bottom tanks*. And those are the tanks referred to as *ballast tanks*. Hence, the record shows by claimant's own pleading that although the forepeak tank was built into the ship for the purpose of supplying the boiler with water (Art. 9, respondent's answer) *it was empty*, and the ship's boiler water was drawn from the ship's ballast tanks, thus continuously reducing the amount of her ballast. So, also the water used to water the cattle was taken from the ballast tanks (Tr., 259), thus still further consuming and reducing materially the ship's ballast, which necessarily seriously affected the ship's stability. That report shows the further fact that about two-thirds of two hundred and twenty-five tons of coal (say 150 tons) were stowed in the shelter deck. This condition, we submit, necessarily to a marked degree, rendered the vessel cranky and liable to turn

over. So it is just as the master of the steamship "Fort Morgan" testified (Tr., 293):

*"If the ship had been straight when loaded there would have been no danger."*

Captain Tho. Johannasen, master of the steamship, "Fort Morgan," respecting the water tank conditions and lack on shipboard of provision for boiler water and for watering cattle, testifies as follows:

Tr. 269:

Q. Then you were using water out of the bottom tanks for boiler purposes—steam purposes—were you?

A. Yes, I guess he did.

\* \* \* \*

Tr. pp. 270-271:

Q. Now, Captain, that doesn't answer the question I asked you. Was your vessel equipped or furnished with any tank that carried water that was used solely and exclusively for boiler purposes?

A. No.

Tr. p. 259:

Q. Now, you say they took the water out of the ballast tanks for the purpose of watering the cattle?

A. Yes, sir.

Q. And that meant taking the weight out from the bottom of the ship?

A. Yes, sir.

Q. And the more weight you take out of the bottom of a ship the more tender she becomes, doesn't she.

A. Yes, sir.

Q. The more liable she is to roll over?

A. Yes, sir.

Tr. p. 268:

Q. You know it is your business to keep your vessel straight?

A. Yes, sir.

Tr. p. 312:

"Libelant offered in evidence a sketch drawn by the master of the steamship 'Fort Morgan,' showing the location of the cattle on the different decks as loaded, according to his recollection, and the position of the ballast tanks—the usual position at the very bottom of the ship, so that the ship would have the benefit of every pound of water contained therein.

"This sketch has gone up in the original."

The following radiograms are proven (Tr. pp. 253-254) to have passed between the president of the owners of S/S. "Fort Morgan," at New Orleans, and the master of S/S. "Fort Morgan," at Port Limon, C. R.

Tr. p. 220:

"'Fort Morgan,' Port Limon:

"Advise if cattle properly loaded also what caused accident and when will sail.

"BURGE."

Tr. p. 219:

"*All cattle properly loaded disaster caused by ballast tanks and heavy seas.*

"THO. JOHANNESSEN,

"Master S/S. 'Fort Morgan'."

Tr. p. 221:

"Burge 'Fort Morgan' *requires drydocking and some repairs* last drydocked New Orleans May nineteen seventeen.

"THOMAS JOHANNESSEN,

"Master S/S. 'Fort Morgan.'"

"Burge" is the president of the Gulf Coast Plantation Company who chartered the vessel as owners to the Central American Cattle Company (Tr. 349).

We will show further on that the alleged "heavy seas," an alleged *concurrent* cause, is a myth.

#### IV.

#### CLAIMANTS FAILED TO PRODUCE THE SHIP'S OFFICIAL LOG OR THE DECK SCRAP LOG, OR ENGINEER'S LOG.

The log book of the steamship "FORT MORGAN," which would have shown all weather conditions, was not produced. The Master admits (Tr. p. 283), before leaving port, conditions of sea visible during daylight. He left at about six o'clock.

Q. You could see the sea on down to as long as the twilight or daylight—

A. Yes; I was looking down on the beach and on the key, but *I couldn't notice anything—anything serious.*

It is not pretended any bad weather existed, but it is urged that a *ground swell*, coupled with lack of sufficient water ballast caused the ship to list.

While we deny that there was any unusual ground swell, anything more than what is to be always experienced along the seashore, we submit that the alleged ground swell is stated only as a *concurrent cause*—the other cause being unseaworthiness of ship, due to lack of sufficient water ballast, which deficiency was occasioned by necessity to use water ballast for boiler pur-

poses, for watering the cattle, etc., because both of the peak tanks were empty on leaving port, one of which was too leaky to hold water, and one of which respondent avers was built into the ship especially for supplying the ship's boilers with water.

It is a most significant fact that the mate's deck log, the engineer's log and the ship log are not before the Court. The ship's official log would show the reading of her barometer, the direction of the wind, its velocity, the condition of the sea, etc., but it was not shown and not produced even to refresh the master's memory. The chief engineer's log, which should show the condition of the tanks, what water he carried in them, what tanks were empty and why; what use was made of the water, etc. The scrap log of the Chief Mate would evidence the continuing list of the vessel and the cause thereof, and would show if anything was done by the officers of the ship to correct that list and with what effect, if any. They are not in evidence.

In a report to determine whether or not the "Fort Morgan" sustained any damage by heeling over, covering a manifestly *superficial survey* at New Orleans, some weeks after the happening of the event, it is said (Tr. p. 396):

"For further particulars see Log Book and Master's Protest.

"It is stated that while vessel lay at the wharf at Port Limon at 6:00 P. M., on November 29th, 1917, with 420 head of cattle on board that vessel, had a list to port of 7

degrees. *After letting go moorings vessel listed over to 13 degrees, and when vessel got outside Port Limon in a heavy swell, vessel listed to port 38 degrees, master considering the danger returned to Port Limon and anchored. About 9:00 P. M., on November 29th, 1917, lifted anchor and came alongside of wharf at about 12:00 P. M., November 29th, commenced discharging cattle that were alive, 212 were found dead and dying, vessel left Port Limon November 30th, 1917, about 5:00 P. M. and proceeded to sea to throw overboard the carcasses of 212 dead cattle. Returned back to Port Limon on Saturday, December 1st, at 7:30 A. M., and anchored awaiting orders.*

"On December 5th, 1917, about 1:00 P. M., came alongside wharf to discharge hay and fumigate, and left for New Orleans on December 5th, 1917, at 9:30 P. M., in ballast, and arrived at New Orleans and anchored at the Point on December 10th, at midnight.

"It is stated that when the vessel was alongside the wharf before leaving Port Limon, that all tanks double bottom were filled, as a certain amount of water had been used on the way from New Orleans where the tanks were previously filled from the Mississippi River, and the amount taken to fill up these tanks at Port Limon is stated to be 60 tons.

"Upon examination of the vessel we find that vessel has no apparent damage."

So, on trip down from New Orleans, down to Port Limon, it appears from the above, water was used from the ship's ballast tanks. It was, manifestly, a dangerous practice freely indulged in on this ship.

The Surveyor who made the above report (Olsen, Tr. p. 309) admits that if the "FORT MORGAN" was loaded with a part deck cargo and part in the hold that such a ship could as safely carry cattle in those places, as she could have carried cargoes of fruit or other goods, if the master had seen to it that he had the necessary amount of ballast; of course, any kind of ballast, water ballast as well as other ballast. Let it be understood that this "water ballast" vessel did not carry an independent supply of water for boiler purpose, etc., hence was continually using up her water ballast for steaming purposes, and ship's use in watering its cargoes of cattle, etc.

#### V.

#### FAILURE OF CLAIMANT TO PRODUCE THE CHIEF OFFICER AND THE CHIEF ENGI- NEER, WHO WERE THOROUGHLY CONVERSANT WITH CONDITION OF TANKS AND LACK OF WATER BALLAST.

The chief engineer and the chief officer of the S/S "Fort Morgan," both volunteered the information set out in the official survey of that vessel herein above quoted. A copy of it was served on the master within a few days of the time of the disaster. The libel was filed within a few months after the disaster. The men continued in the service of that vessel for a period of time not disclosed by the record. There is nothing in the record to show how long after the libel was filed in this case these men continued in the ser-

vice of the ship, or that anything was done to enable claimant to keep in touch with them.

Claimants set up, through their proctor, Mr. Leovy (Tr. p. 395), February 26, 1920, that they had made every effort to locate these men, but because of the long time the suit was pending they were unable to do so; without any showing how long these men continued in the service of said vessel, etc., or why their testimony had not been taken before or at the time their services with the company terminated. In fact, the master, when testifying September 17, 1919, says (Tr. p. 267) he did not know where the engineer was.

*"He may be on the boat yet, I can't say."*

We deem it sufficient to mention the above fact, leaving to your honors to determine what inference arises therefrom, without citation of authorities.

## VI.

### CONSTRUCTION OF THE CATTLE FITTINGS. BY WHOM MADE AND THEIR SUFFICIENCY.

The contract between Armour & Company, and the American Cattle Co., Inc., which respondents have brought into this case, does, in respect to one of the provisions in that part, which undertakes ocean transportation at a stipulated ocean freight, specially provides, as follows (Tr., 80):

"It is understood that first party (Central American Cattle Co.) is to charter and equip one or two steamers for carrying such cattle. All such equipment to be at the expense of first party or the Steamship Company, and



to be constructed to the satisfaction of the inspector of the underwriters interested; and, in addition, ample space to feed and water said cattle. Likewise, steamer to provide ample supply of good fresh water for the cattle and ample supply of United States hay or native grass for feed for said cattle during said voyage; \* \* \* "

The foregoing undertaking of the charterer was carried out at their own cost, charge and expense and to the full satisfaction of the master of the ship, without any assistance from or interference by libellant, as will be presently shown.

In the fourth article of the libel it is specifically alleged that the said cattle were all safely placed on board of said vessel; were properly stowed and tied to make the voyage without danger to them, and would have safely made the said voyage but for the unseaworthy condition of the said vessel.

The Central American Cattle Company, Inc., in their answer to this article says:

"The allegations of the Fourth Article of the libel are admitted to be true."

The Fort Morgan Steamship Company, Ltd., denies the allegation that the vessel was in an unseaworthy condition, and says that as to the remaining allegations of said article, they have not sufficient information for answer. In other words, although the radiograms produced show that the Master of the steamship "Fort Morgan," sent a wireless

to the president of the Company owning said ship, in response to the request that he, the president, be advised if the cattle were properly loaded, answered that wire by saying all cattle were properly loaded (Tr. p. 219). The claimants pretend in their answer not to know whether the cattle was properly loaded or not, and have sought to show that the cattle pens were not properly constructed, that they broke down under the strain of the cattle, causing the vessel to list, and that they should not have been constructed on the deck or in the hold of that ship.

Not only was the ship chartered as a general carrier of goods and merchandise to a cattle company, but it is a fact that this same ship on previous occasion operated solely for her owners' account, had carried on board five hundred fifty (550) head of cattle (seventy more than she had for libelant) for the Battencourt interest (Tr. p. 237). The master says on page 285 that the owners knew of those services.

So, also, the master of the "Fort Morgan," at Tr. p. 286, testifies that she carried deck cargo of lumber and at page 230 says:

Q. State the nature of cargoes that were carried on the ship on these trips.

A. Four cargoes of bananas, and one cargo of cattle prior to that last one, and several cargoes of corn, and hogs on deck, to Havana from New Orleans and generally all sugar from Cuban ports to New Orleans."

These besides the lumber trips before referred to.

It is also shown that the president of the Company sent on board or knew that there was delivered on board at the City of New Orleans a quantity of lumber to be used for constructing the cattle fittings for the particular voyage under consideration and his wireless to the master (Tr. p. 30) particularly asks:

"Advise if cattle properly loaded."

Then there stands the master's uncontradicted testimony given in the presence of the president of the owning Company, who succeeded the master as a witness, stating that he was advised by the ship's owners to follow the Central American Cattle Company, Inc., orders (Tr. p. 263), and on page 252 the master testified further that Mr. Wilden, president of the Central American Cattle Company, Inc., represented the steamship "Fort Morgan" and owners, respecting the construction of the cattle fittings. The master testifies (Tr. pp. 289-290 and 320) that he approved of the way the cattle pens were built and the way in which the cattle were loaded on board. That in his judgment the cattle were properly stowed and tied.

Notwithstanding the repeated averments set out in the Fort Morgan Steamship Company's answers that Armour & Company, undertook and that Armour & Company were obligated to and that Armour & Company participated in the construction of the cattle fittings, there is not in this record any credible testimony which justifies any such declaration. The Central American Cattle Company, Inc., were obligated

to erect suitable cattle pens, properly located to the satisfaction of the underwriters, etc. The cattle company admitted that this service was a duty resting solely upon themselves and contended that they did construct proper, suitable, safe fittings.

Before pointing out evidence which shows that the libelant had nothing to do with construction of fittings, that the libelant did not by itself, or by or through any of its representatives give authority to any one to participate in the construction thereof for the account of libelant, we will first take up the testimony of the master of the steamship "FORT MORGAN" to show that the cattle pens were not only constructed by and with his consent, but were in every respect approved by him, and by him deemed safe and proper.

In the cross-examination of Captain Johannesen, master of the said vessel, he testifies (Tr. pp. 289-290):

Q. Now, when these cattle pens were being constructed, you looked after whatever was necessary to be looked after with respect to them, that related to the safety of the ship, didn't you?

A. Yes, sir, I was looking after everything, especially the things that was needed most for the ship, for the ship listing over—I was looking after everything on the ship like the shifting-boards and *things that would make the ship secure*, and then while they were putting the pens up, I left that to Wilkinson to do the best way for the cattle.

Q. Did you tell him about how many cattle you wanted to the pen?

A. No. Of course, I couldn't do that. That was up to him. That was his business. *So long as I saw that the ship was safe.*

Q. In other words, anything they would do that you thought was not safe or proper you would not let them do it, would you?

A. No, sir.

Q. *So whatever they did, when it was finally finished up, that met with your approval?*

A. Yes, sir.

Q. *Therefore, you approved of the way these cattle pens were built and you approved of the way the cattle were loaded on board.*

A. Yes, sir.

Q. Any changes that you wanted made, and anything that you wanted done, no matter what it was, they were always ready and willing to do it as you wanted?

A. Yes, sir.

In the testimony of this same master of the steamship "Fort Morgan," on pages (Tr., 320), he affirms a previous statement made by him, to this effect:

Q. Captain, going back to the matter of that protest or statement that was made by you to the captain of the port, or before the captain of the port of Port Limon, it appears from the copy that I have of that report that you stated to the port captain as follows: "I must say also that to my judgment the cattle was *properly stowed and tied* to make the voyage without any danger." Is that correct?

A. *That was my belief when we left the wharf.*

That ARMOUR & COMPANY, INC., had nothing whatever to do, directly or indirectly with the construction of the cattle fittings or any part thereof is evidenced by the following testimony of Mr. Edward J. Mitchell (Tr. p. 148), agent for Armour & Co.:—

Q. Did Armour & Company through you or anyone else have any supervision or direction or control over the putting up of those fittings?

A. No, sir.

Q. Do you know if Mr. Wilkinson in any way aided in any part of the work?

A. Only he worked for Whilden (President of the American Cattle Company). He worked and helped in putting up his fittings.

Q. Was he doing that on behalf of Armour & Company?

A. No, sir.

Q. Did Mr. Wilkinson ask you anything about his going in to aid or assist in the putting up of those fittings?

A. He did. He asked me if it was all right. I told him he didn't have anything to do with that, and I was kinder surprised that he was working, and he told me that Mr. Whilden (President, American Cattle Company) was paying him for helping him, because the carpenters and good labor was hard to get down there, and I told him at the time, why, it would be all right.

Q. But in doing that he was working for Mr. Whilden, of the Central American Cattle Company?

A. Yes, sir.

Mr. Mitchell, who testified as above, was representative of Armour & Company, to inspect and accept

cargo; and Mr. Wilkinson was employed by Armour & Company as super-cargo only; so, therefore, his duties for Armour & Company could commence only after the Armour cargo was laden on board. He died some several months before libelant's testimony was taken.

We respectfully submit that the fittings were properly constructed; that the master of the ship saw to it that these fittings did not interfere with the safety of the ship; and that libelant had nothing to do with their construction, and was not charged with any obligation to do anything in respect to those fittings. That, in so far as libelant was concerned he had a right, an absolute right to look to the master of that ship to see that she was safely and properly loaded before she commenced her voyage.

## VII.

### MEASURE OF DAMAGES.

That the contract for the sale and purchase of the cattle f. o. b. the steamer "Fort Morgan" was completed and at an end between the parties is evidenced by the receipt given by their agent, James Mitchel, appearing at Tr. p. 187, which acknowledges *receipt and acceptance* from the Central American Cattle Company, Inc., in good condition on board of the Norwegian steamship "Fort Morgan," the cattle concerned in this case, weighing three hundred forty-six thousand three hundred two pounds (346,302 lbs.) live weight, applying on the contract of sale referred to, which stipulates that this cattle should be paid for f. o. b. the vessel, at five cents per pound, live weight.

On Tr. p. 186 appears the American consular health certificate which shows that on the same day the cattle were loaded on the S/S "Fort Morgan" the said Mitchell, agent for Armour & Company, libelant, made affidavit, as required by law, that the said four hundred twenty (420) heads of cattle on board of that steamer belonged to Armour & Company.

The bill of lading of the steamship "Fort Morgan" provides Tr. p. 24 that the carrier will not be liable for more than the invoice value of the goods. This invoice value is shown to be seventeen thousand three hundred fifteen 10/100 dollars; being the said three hundred forty-six thousand three hundred two pounds (346,302 lbs.) shipped f. o. b. at five cents per pound.

Mr. Kirk, Tr. p. 175, counsel for libelant, having personal knowledge of the money paid out by libelant, as a result of the disaster complained of, says:

A. \$17,051.91, money that Armour & Company has actually paid out on account of the cattle which were originally loaded on the steamer "Fort Morgan," after allowing the credits for the fifty that were received.

\* \* \*

A. That is the actual expenditure by Armour & Company on account of these 420 head of cattle, not counting any expense of our men in Central America or any other expense at all, other than what we have actually paid the Central American Cattle Company.

But there was cattle saved from the disaster, put out at pasture, and expenses incurred in relation to



their care. Against those expenses stands certain returns, all of which figure out as follows:

Of the cattle saved one hundred forty-nine (149) head had been so injured, notwithstanding their care and upkeep, the best figure obtainable for them in Central America was twenty dollars (\$20.00) per head (Tr., p. 159), they being unfit for shipment to the United States. This gives a total of two thousand nine hundred eighty dollars (\$2980.00).

Fifty more head of cattle were conditioned for shipment and delivered to ARMOUR & COMPANY, Jacksonville, Florida. They were worth three thousand seven hundred fifty dollars (\$3750.00), but against this was a freight payment of twenty-five dollars (\$25.00) per head, or a total debit of one thousand two hundred fifty dollars (\$1250.00), leaving a net value of two thousand five hundred dollars (\$2500.00), for cattle so shipped.

Against this five thousand four hundred eighty dollars (\$5480.00) stands the cost, charges and expenses for labor, foodstuff in the care of these cattle, amounting to two thousand two hundred eighty-three dollars and thirty-two cents (\$2283.32). This leaves a balance of three thousand three hundred ninety-seven dollars (\$3397.00).

The testimony on the question of these losses is set out in the deposition of W. C. Kirk (Tr. pp. 168 to 177, inclusive) and in the vouchers produced by him and referred to in those depositions. Mr. Kirk is a member of the law department of libelant company, who was in charge of those transactions.

Our determination of the losses from the above accounts figure out as follows:

Invoice value of cattle.....\$17,350.10

GROSS RECEIPT FROM SAVED  
CATTLE:

149 head @ \$20.00....\$2,980.00

50 " shipped @

\$75.00 ..... 3,750.00

---

\$6,730.00

LIABILITIES:

Cost of feed stuff and

help ..... 2,283.82

Freight on 50 head.... 1,250.00

---

\$3,533.82

Net balance on these transactions \$3,196.18

This balance of \$3,196.18 was divided between libellant and Central American Cattle Company, Inc., who furnished pastures and incurred other expenses, such as representatives to superintend care of cattle, etc., details of which were not kept. This division gave libellant .....\$ 1,598.09

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TOTAL LOSS .....\$15,752.01

This balance does not take into consideration expenses of representatives and other services incurred by libellant, performed herein, but of which no detail account has been kept. (Kirk, Tr. p. 175.)

So, therefore, libelant believes it is justly entitled to receive from the steamship "Fort Morgan," and on her release bond, at least the sum of fifteen thousand seven hundred fifty-two 01/100 dollars (\$15,752.01), plus legal interest from judicial demand.

The claim for damages, set up in the libel, was based upon the value of the cattle at Jacksonville, Fla., plus freight. But, as the claim for freight was in error, it not having been paid, that item is eliminated; and as the value of the cattle is, under the terms of the bill of lading sued on herein, to be taken at their invoice value, the losses should have been computed on that basis, a total of seventeen thousand three hundred fifty dollars and ten cents (\$17,350.10).

Then, too, the libel was filed long before it became apparent that any net recovery would be had in the care and handling of the maimed and sickened cattle saved from the disaster. So that this element is, also, to be now considered.

Taking the apparent net value derived from caring for and handling the saved cattle "*for account of whom it might concern*" (Tr. p. 155), as shown above, at three thousand one hundred ninety-six dollars sixty-eight cents (\$2,196.68), of which sum libelant, for all its services in the premises received and agreed to receive one-half thereof; the other half going to the party furnishing the pastures and affording other services, would, apparently, we submit, in no event, justify any further deduction from libelant's demand than the said one-half, or say one thousand five hundred ninety-eight dollars and nine cents (\$1,598.09) which will leave a balance to libelant herein of fifteen thousand

seven hundred fifty-two dollars and one cent (\$15,752.01).

The allowance of that one-half of the apparent net proceeds from said cattle being one thousand five hundred ninety-eight dollars and nine cents (\$1,598.09) to libelant, cannot compensate for the cost incurred in having proper inspection of the said cattle made by its representative, the sending of a supercargo to the scene, exercising a measure of supervision over the maimed and sickened cattle, but for all of which, however, no distinct account was kept.

Whether or not, when libelant made its second contract with the Central American Cattle Company, Inc., which afforded to libelant certain benefits and advantages in other matters entirely foreign to this case, it did pay the sum of nineteen thousand dollars (\$19,000.00), which included the aforesaid price of seventeen thousand three hundred fifty dollars (\$17,350.00) for the cattle shipped on the steamship "Fort Morgan," which sum libelant was bound to pay as of the date of the actual shipment of the said cattle, we submit is something entirely beside the question of how much the "Fort Morgan" should pay under the terms of the bill of lading, because of the damage occasioned by its own unseaworthiness, which involved a gross breach of its own warranties, etc.

We respectfully submit that the liability of the "Fort Morgan" is fixed by the terms of the bill of lading which was executed by her master, and by her master personally delivered on shipboard to libelant's representative (Mitchell, Tr. p. 149).

## VIII.

*In re libelant's contention that because of the existence of a contract between Armour & Company and the Central American Cattle Company, stipulating two distinct separate, several obligations, one of which for sale of cattle f. o. b. a steamer; the other of which making libelant as the vendee the shipper of said cattle, as his own, and providing for ocean transportation in suitable steamer at ocean freight rate, etc., bars this suit although brought on a bill of lading issued to libelant as the shipper of its cattle destined for delivery to it at Jacksonville, Fla., a bill of lading executed on shipboard to libelant's agent.*

We respectfully submit that the issue raised is absolutely without merit, and but for the fact that this matter is set up in respondent's answer as an issue, we would pay no attention thereto. But, believing that each issue raised should be discussed in our brief, we submit the following, with apologies to the Court for trespassing upon its time in this irrelevant matter.

The Central American Cattle Company took the steamship "Fort Morgan" under charter for services as a common carrier, under date August 23, 1917, for a period of one year (Tr. pp. 70-78), and as such a carrier employed her between American, Cuban, Mexican, Costa Rican and other Gulf ports, in transportation of cattle, lumber, sugar and other merchandise and passengers. During this time, that is to say, on the third day of October, 1917, the said Central American Cattle Company and Ar-

mour & Company entered into the referred to contract for two separate, several and distinct services, to-wit:

First: The Central American Cattle Company agreed to procure cattle and bring them to Port Limon, Costa Rica, or other ports agreeable to parties, where their physical condition would be examined to make certain they would pass inspection at United States port; wherein Armour & Company agreed to pay for those *accepted at said Port Limon*. Payment to be made to the Central American Cattle Company upon receipt of cable advice at New Orleans, specifying the number and weight of cattle accepted and loaded on the steamer. This was for a sale of cattle f. o. b. the steamer at a stipulated price based upon actual weights made at time of delivery on shipboard, and from that time on the super-cargo, appointed by libelant, looked after libelant's interest on shipboard in line with those duties only which appertain to those of a super-cargo.

This provision, we respectfully submit, settled the question of purchase and ownership in said contract (Tr. pp. 79-80); because, just as soon as accepted at Port Limon f. o. b. the steamer, Armour & Company then and there became liable for the agreed purchase price and incurred the advantages and liabilities of owner. So here ended the buying and selling feature of the contract. In fact, in this case, when the cattle was so delivered, libelant's agent issued a receipt therefor, accepted them for libelant and on the same day appeared before the American Consul and made affidavit that Armour & Company were the owners of said cattle, and declared their phy-

sical condition (see Tr. pp. 186-187). Manifestly, here ended fully and completely the buying and selling feature of the contract. Then in respect to this cattle, which became the property of libelant when and as above stated the said American Cattle Company, Inc., treating Armour & Company as such owner and shipper further stipulated in the said contract as a distinct, several obligation, as follows:

SECOND: That the Central American Cattle Company would charter and equip one or two steamers for carriage of cattle; with all such equipment to be at the expense of said Central American Cattle Company, or the steamship company, to satisfaction of insurance inspector, with further stipulation for ocean freight care and ventilation of cattle, watering and feeding them, etc. In fact, the usual provisions for ocean transportation of cattle, with stipulations for dockage, demurrage, etc. No particular ship is named. In the instant case the shipment was made on the "Fort Morgan," and bill of lading was issued by the master of that ship covering this shipment. Libelant contends that receiving the cattle on board and entering upon the obligation to transport and deliver them, even independent of the bill of lading, did, as to the steamship "Fort Morgan," create the liability of a carrier.

So, we respectfully submit that the aforesaid agreement with its two entirely separate undertakings, in so far as this suit is concerned, particularly, shows a conclusion of the sale feature, leaving only the separate, severable ocean transportation maritime stipulation and question of jurisdiction is not involved therein.



But aside from all of this, since the suit is not in any way directly or indirectly based upon that contract, but is brought solely and exclusively upon libelant's right arising under its shipment and the bill of lading aforesaid, we respectfully submit that there was no good reason for the bringing in of that contract; and we further respectfully submit that the existence of said contract cannot in any way impair libelant's right to hold the steamship "Fort Morgan," a common carrier, responsible for damages done to libelant's goods, accepted on board of that vessel by her master, for transportation to a given destination, with the implied warranty arising from such acceptance by the master, that the ship was in a condition suitable for the proper transportation of those goods.

As was well said:—

"The ship, however, would be answerable for any negligence that caused damage to the cargo after its shipment on board; that is to say, it would be answerable to the shipper upon the implied contract to transport safely, and that there should be no unreasonable delay in commencing and prosecuting the voyage after the cargo had been received by the vessel. 1 Pritch. Adm. Dig. p. 492, Sec. 223; The T. A. Goddard (D. C.) 12 Fed. 174; The Euripides (D. C.) 52 Fed. 161. And 'a person whose goods are transported by contract with a charterer, in a chartered vessel, navigated by her owners, is not limited, in case of loss or injury to his goods, to his remedy against the charterer on the express contract with him, but may directly pursue the vessel or her owners, who have caused the loss.' The T. A. Goddard, *supra*; New Jersey Steam Nav. Co. v. Merchants' Bank, (6 How. 344, 12 L.



ed. 465." The *Hiram*, 101 Fed. R. 138, at pages 140-141. See also, *The Waterwitch* 19 How. Pr. 241, affirmed in 1 Black, 494; *The Peytona*, 2 Curt. 21, 27, etc.

## IX.

*Respecting contention by the Fort Morgan Steamship Company that a settlement of a certain suit brought by the Central American Cattle Company against libelant under the terms and conditions of a certain contract made between said parties operates as a bar to this suit against the steamship "Fort Morgan."*

Here, again, has been interjected an issue, which, we respectfully submit, has no rightful place in this suit; and, again, because raised as an issue, we feel we should discuss it, we do so, with due apology to the Court for thus trespassing upon your valuable time.

Within a few hours after the cattle were accepted by libelant f. o. b. the "FORT MORGAN," she had sailed from port and returned in a nearly capsized condition; her voyage broken up and with heavy loss of cattle. So, before libelant could make payment of the price of such cattle, upon cable advice of the amount thereof, it was advised by another cable of the disaster with consequent loss. Hence, libelant declined to pay the stipulated price to which the Central American Cattle Company had coupled a demand for the full freight, which was payable lost, or not lost.

Armour & Company required time to investigate the situation, and pending this investigation the American Cattle Company brought suit against them to recover such sums.

Then, too, libelant brought suit against the "FORT MORGAN" for value of the cattle.

A new contract was made by and between the Central American Cattle Company, Inc., and libelant respecting payment of the purchase price of said cattle, and for further sales with stipulation, for shipment thereof by certain steamers, etc.

The said contract is solely between the American Cattle Company and libelant, and neither the said Fort Morgan Steamship Company or the said vessel is party or privy thereto.

Said contract does not in any way release said Central American Cattle Company of any rights the said steamship or its owners may have against it; nor does the Central American Cattle Company urge it in defense of the action of the Fort Morgan Steamship Company in bringing them into this cause, to pay over to the said Fort Morgan Steamship Company any sum libelant may recover on its action herein.

No claim or demand has been set up by libelant against the said Central American Cattle Company, nor has libelant released said cattle company of any liability it may have in the premises.

#### LAW.

In the submission of what we believe to be the law of this case we will first submit those authorities which bear upon the rights of an owner who has shipped his goods by a common carrier to hold that ship responsible, *in rem*, for any damage sustained by those goods due to the unseaworthy condition of that vessel irre-

spective of whether the master has signed a bill of lading solely and exclusively as master or whether he has signed for the charterers or whether the charterers have signed, or even if no bill of lading be issued at all. That the authorities hold a responsibility on the part of the ship flows from the very act of the master in receiving the goods on board for transportation and delivery. That the moment the goods are on board and in the custody of the master the obligation between the ship and cargo is mutual and reciprocal, each being bound to the other. The ship, in every instance, being held for damages resulting from its own unseaworthiness where that condition existed at the time of the commencement of the voyage, whether the vessel be under charter or not.

We submit as a well considered case bearing directly upon the issues involved in this cause the case of *Olsen v. United States Shipping Company*, 213 Fed Rep., pp. 20-21, determined in the United States Circuit Court of Appeals, for the Second Circuit, with Circuit Judges Lacombe, Ward and Rogers presiding, wherein the Court held as follows (Italics all through are ours):

"The consignee of the cargo at Aberdeen sued the ship owners for the value of the cargo jettisoned, who, in pursuance of correct legal advice, paid the claim. The District Judge allowed all these claims of the owners on the ground that they resulted from the improper loading, which was done by the charterer and which the charterer insisted did not affect the steamer's seaworthiness. This was, in our opinion, error. It is true that when charterers load cargo against the

protest of the master, in such a way that it is itself damaged and/or damages other cargo the charterer will be liable. The *Centurion* (D. C.), 57 Fed., 412. Likewise, when cargo loaded on deck by agreement is lost because of a peril of the sea the ship will be excused. *Lawrence v. Minturn*, 17 How., 100, 15 L. Ed., 58. We are not willing to extend this to such a loading as makes the ship herself unseaworthy when no peril is encountered. *It would, in our opinion, be unwise and dangerous to impair the implied warranty of seaworthiness of the ship herself.* The District Judge rightly held that the steamer was unseaworthy on leaving Ship Island. The jet-tison was caused not by sea peril, but by her own instability. *It makes no difference whether this was due to the amount of the stowage of the deckload alone or also to the fact that the largest ballast tank could not be filled. All these matters were under the absolute control of the master and it was his duty to see that they were right. It was no excuse to him that the charterers did the loading;* insisted upon his taking the deckload or that surveyors certified that the ship could do so safely. No doubt both thought so. That, however, did not lessen his duty, especially in view of the fact that he did not think so himself.

"The owners seek to sustain the decree on various grounds. They say that the warranty of seaworthiness was satisfied if the ship was seaworthy when the voyage began, which they say was at New Orleans, as she certainly was. *If this be admitted, it will be no excuse to the owners if the master subsequently made or allowed others to make the vessel unseaworthy.*

"Then they rely on such analogies as landmen requiring builders or manufacturers with whom they contract to use certain material or follow certain construction which results in loss. Such relations have no resemblance to the relation of vessel and cargo or to the supreme authority of the master of a ship. There is no such warranty as that of seaworthiness and the builder or manufacturer has no such absolute authority or duty as has the master of a vessel.

"They rely also on Article 30 of the charter providing that the deckload shall be at the charterer's entire risk, *but this does not cover a risk caused by the unseaworthiness of the vessel.*

"Then they say that clause 9 in which the charterers indemnify the owners against any liability arising from the bill of lading entitles the owner to recover. But the bill of lading did not increase the liability of the owners under the charter party. Indeed it restricted it. *The cargo did not belong to the charterers and if it did, the owner's liability for unseaworthiness would be exactly the same.*

"Finally cases are cited in which charterers were owners *pro hac vice* and therefore could not reclaim because of unseaworthiness caused by themselves. Obviously they have no application."

Another case, which we believe exhausts the leading authorities on the subject, and bears directly on this case is that of *The Esrom*, 272 Fed. Rep., p. 266, we cite therefrom fully, beginning with paragraph 2, and extending through paragraphs 2, 3 and 4, p. 271; determined in the United States Circuit Court

of Appeals for the Second Circuit with Judges Ward, Hough and Manton sitting, the Court said (*Italics ours*):

"The ship may be held liable *in rem* for damages to the cargo, *even though no bill of lading or contract ...of ...affreightment was signed by the master*. A shipowner may be held to the common-law liability. In *Brower v. Water Witch*, Fed Cas. No. 1971, affirmed 66 U. S. (1 Black), 494, 17 L. Ed., 155, it was held that where a shipment of cotton was damaged, even if no bill of lading or other agreement was entered into by the master, the receipt of the merchandise, by the vessel consenting to its being loaded for a port of destination, subjected the ship to liability; that the agents of the charterers in whose services the brig was at the time, and who were interested in procuring cargoes, and who entered into an agreement fixing the terms upon which the shipment was to be made, made the vessel bound by such agreement. The obligation is imposed as a common-law obligation of the carrier. In *The Euripides* (D. C.), 52 Fed., 161, it was said:

"But the liability of the ship would be the same without any bill of lading. The original charterers undertook to transport these goods; this was done by the authority and consent of the shipowners, for such was the very object of the charter. *The ship is therefore answerable for any negligence that causes damage to the goods, and is answerable to the shipper, or to his vendee, upon the implied contract to transfer safely, whether a bill of lading is issued or not.*

"In *the Centurion* (D. C.), 57 Fed., 412, Judge Brown said (*Italics ours*):

"*The charter includes nothing that even*

*by implication excludes the ordinary security of a lien in favor of the cargo against the ship for the performance of the ship's duties in the business for which she was chartered. The ship is therefore liable for bad stowage, because the duty to stow properly is one of the duties of the carriage which the owner has expressly authorized. The Freeman v. Buckingham, 18 How., 182; Niagara v. Cordes, 21 How., 7. The ship is liable for damage from bad stowage, whether the stowage is done by the owners' agent or the charterers', and equally so whether there is any bill of lading or not. It was therefore immaterial whether the bill of lading was signed by the master or by the charterers.'*

"In the case of *The Sprott* (D. C.), 70 Fed., 327, a steamer was held *in rem* for damages to cargo which was carried on deck although the bills of lading were signed by the charterer. It was there said:

" 'I do not think it is any defense to the ship that the bill of lading signed by the master recited the shipment of all the cargo as having been made by the charterers. The ship is not entitled to claim from that circumstance that it was dealing with the charterers alone, and had no privity with the actual shippers. For the master knew to the contrary. His own bill of lading recited the actual shippers, and he knew that the usual bills of lading had been given to those shippers on the ship's account. To suffer the ship, therefore, to deny any privity with the actual known shippers, under cover of a single bill of lading given to the charterers as sole shipper, would be to uphold a mere subterfuge, and a virtual fraud upon the shippers; since the ship's bills of lading were



given to shippers with the master's knowledge and concurrence, and on his account. The master, knowing that clean bills of lading had been given for the 163 bales, knew that the charterers had no authority to ship them on deck at shipper's risk. His own bill of lading to the charterers, with that exception inserted, is therefore, no protection to him or to the ship; and if he repudiates the bill of lading signed in his behalf by the charterers, as respects goods other than the charterers' goods, he is in the situation of a master who has received goods for transportation without giving any bill of lading for them at all; and upon that theory he would be bound to carry the goods in the customary manner; that is, under deck. The Delaware, 14 Wall., 579.'

*"If negligence were proved, or fault shown, the Esrom would be responsible to the libellant independent of the form of contract of affreightment, or even though the bill of lading was not signed by the master.*

"There were reciprocal liens between the Esrom and the cargo of prunes, which arose at the time the cargo was received on board and obligations were then imposed. In Vandewater v. Mills, 60 U. S. (19 How.), 82, 15 L. Ed., 554, it was said:

"'But this duty of the vessel, to the performance of which the law binds her by hypothecation, is to deliver the cargo at the time and place stipulated in the bill of lading or charter party, without injury or deterioration. If the cargo be not placed on board, it is not bound to the vessel, and the vessel cannot be in default for the non-delivery, in good order, of goods never received on board.'



"But the obligation between the ship and cargo is mutual and reciprocal, and does not attach until the cargo is on board or in the custody of the master. *The Lady Franklin*, 75 S. (8 Wall.), 325, 19 L. Ed., 455; *Scott v. Ira Chaffee* (D. C.), 2 Fed., 401. This rule is not inconsistent with the authorities cited, which hold that the vessel's lien upon the cargo is subject to be defeated if, before the vessel breaks ground, she becomes unseaworthy or disabled and unable to finish her voyage. *Tornado*, 108 U. S., 342, 2 Sup. Ct., 746, 27 L. Ed., 747; *Eugene Viesta* (D. C.), 28 Fed., 762. But the lien of the vessel upon the goods and of the goods upon the vessel attaches from the moment the goods are laden on board, and not from the time only when the ship breaks ground. *Bird of Paradise*, 72 U. S. (5 Wall.), 545, 18 L. Ed., 662; *Bulkley v. Naumkeag Co.*, 65 U. S. (24 How.), 386, 16 L. Ed., 599.

"This Court said in *National Steam Nav. Co., Ltd., v. International Paper Co.*, 241 Fed., 862, 154 C. C. A., 565:

"The obligation of the ship to carry, and of the shipper to pay for the carriage, accrues when the goods are delivered to the ship."

*"The obligations which are created one to the other, then, are that the ship is bound not to injure the merchandise by improper stowage or rough handling, and, if she does, then there will be a liability in rem, even before the voyage is begun. If the voyage is begun, the vessel must carry the goods to destination on the terms agreed by the shipper with the charterer; for when the vessel starts upon the voyage, by implication, there is a ratification and adoption by the ship of*

*the charterer's contract with the shipper.* Then the shipper is deprived of an opportunity to retake his goods, and the goods are in the sole possession and control of the ship. So, too, the ship is then bound by the charterer's bill of lading, under which the freight is prepaid, and cannot collect further freight at destination. *The Ada* (D. C.), 233 Fed., 325. Before sailing, the vessel owner is protected by his opportunity to refuse to carry the goods on the terms agreed by the charterer before the voyage is commenced."

Judge Ward filed a dissenting opinion in the above case, contending that the ship's liability was even greater than that announced in the majority opinion. But, as stated by Hand, J., in *The Poznan* (276 Fed. R., par. 12, p. 432), referring to the above case of *The Esrom*, says:

*"it was agreed by all the Judges that the charterer's bill of lading bound the ship."*

In the case of the *Aktieselskabet Fido v. Lloyd Brasileiro*, 288 Fed., p. 62, determined in the United States Circuit Court of Appeals, for the Second Circuit, before Rogers, Hough and Manton, Circuit Judges, the Court said:

"Even if a case of improper loading had been made out, it would only prove that the masters were negligent in permitting the coal to be so loaded, and the owners of the ship would be responsible, as the negligence of their agents, the masters, would be imputable to them, and they would not be entitled to recover. In *Olsen v. United States Shipping Co.*, 213 Fed., 18, 129 C. C. A., 607, the owner of a vessel sought to recover damages

from the charterer because of improper loading. We held in that case that there could be no recovery, and that the matter of loading was under the absolute control of the master, and that it was his duty to see that the cargo was properly loaded, and that it was no excuse to him that the charterers insisted on loading in an improper manner."

In *The Poznan*, 276 Fed. Rep., p. 432 (S. D. N. Y., Judge Hand), the Court held in paragraph 12, as follows (italics ours):

"(12) *The last question is of the parties liable. First, of the ship.* The charter party did not provide that the master should sign the bills of lading; that clause in the printed form being struck out. By an addendum it provided that the Acme Company should issue no bill of lading until the freight had been paid to the Polish Company. Thus the charter party clearly contemplated bills of lading running in the name of the Acme Company, and they all so read. Most of them were in fact signed by the Company, but a few by the master. *So far as concerns the ship, it makes no difference. Being once laden she was bound for right delivery though the charterers sign.* The *Euripides* (D. C.), 52 Fed., 161; *The Centurion* (D. C.), 57 Fed., 412; *The Freda* (D. C.), 266 Fed., 551. In the *Esrom* (No. 2), 272 Fed., 266 (C. C. A. 2nd), February 24, 1921, it was agreed by all the Judges that the charterer's bill of lading bound the ship for right delivery. Indeed, the cargo would have a 'privilege' against the ship for right delivery, even without any bill of lading. The *Saturnus*, 250 Fed., 407, 162 C. C. A., 477, 3 A. L. R., 1187."

## BURDEN AS TO SEAWORTHINESS AND WHAT IS UNSEAWORTHINESS.

In the case of *The Oneida*, 128 Fed. R., 687, before Wallace, Townsend and Coxe, Circuit Judges, the Court held:

"In a suit to recover for loss of cargo by the sinking of a ship, the burden of proving seaworthiness at the beginning of the voyage rests with the shipowner."

The Court further held:

"We concur in the conclusion of the District Court that THE ONEIDA was unseaworthy when she left Charleston. A few words only need be added. The burden was upon the claimant to show that the vessel was in a fit condition to transport the cargo undertaken to be carried: in short, that she was seaworthy. The Southwark, 191 U. S., 1, 24 Sup Ct., 1, 48 L. Ed.,—. This burden has not been sustained. The Oneida was not in a fit condition to carry her cargo to Boston, Mass., having in view all the conditions reasonably to be expected during the voyage. At the time she broke ground she had a starboard list of eight or nine degrees, and within twenty-four hours thereafter she rolled over and took an equal list to port. This list increased until the morning of the 20th of September when she again turned to starboard with a list of fifteen degrees. This condition cannot be accounted for either by the state of weather or the slight shifting of the cargo. The instability indicated at Charleston steadily increased as the ship continued her voyage. In the nature of the case this was inevitable and must have been known to her master at the time. The coal and water were

stowed below the center of gravity and as these were consumed the tendency to become topheavy increased. It cannot be said that a vessel is in a seaworthy condition which has at the inception of her voyage little, if any, positive metacentric height, a list of eight or nine degrees, and her cargo weight so distributed that her instability must increase as she proceeds. Perhaps the most persuasive proof of her inability to reach her destination safely is found in the fact that the list increased so rapidly that on the morning of the 21st, when there was a starboard list of 20 degrees, her master, fearing that she would be unable to reach Boston, put into the port of New York in distress."

In *W. J. McCahan Sugar Refining Company v. Steamship Wildcroft*, 201 U. S., 376; 50 L. Ed., page 794, at page 797, the Court says:

"We are very clear that this is not a case where the findings of the Court below can be disturbed, as was our conclusion in the case of *The Southwark*, *supra*, relied upon by the petitioner, where it was shown that the damage inflicted was the result of unseaworthiness in respect to a condition which a proper inspection of the vessel at the beginning of the voyage would have discovered and remedied. We, therefore, reach the conclusion that the decree of the Circuit Court of Appeals should be affirmed and but for its construction of the rule of evidence in causes of this kind this opinion might well end here. But we are unable to agree with the views expressed in the opinion of the learned Circuit Court of Appeals to the effect that where a shipowner seeks the protection of the immunity afforded by the Harter Act under p.

3, reliance may be had upon the presumption of law that the vessel was seaworthy at the beginning of the voyage, and that it is only in cases of conflicting proof that the burden is imposed upon the shipowner of establishing by testimony the seaworthiness of the vessel, or due diligence in that behalf, in order to have the benefit of the act. We think this construction of the law is opposed to the terms and policy of the act, and contrary to the decisions of this Court heretofore announced, from which we see no occasion to depart. The relief afforded by the third section of the Harter Act to the owner of a vessel transporting property is purely statutory. In the case at bar there could be no question as to the liability of the vessel owner from the established facts of the case, but for the immunity afforded by that act. To permit a cargo of sugar to be injured by the introduction of fresh water in the manner shown, but for the provisions of this act, would have made a case of clear liability against the owner; and where the statute has given immunity against such loss by reason of error in navigation or management, it does so upon the distinct condition that the owner shall show that the vessel was in all respects seaworthy and properly manned, equipped, and supplied for the voyage; or, if this cannot be established, that he has used due diligence to obtain this end. The discharge of this duty is not left to any presumption in the absence of proof. It is the condition precedent, compliance with which is required of the vessel owner in order to give him the benefit of the immunity afforded by the act. The reason for requiring this proof by the owner is apparent. He is

bound to furnish a seaworthy and properly equipped ship for the purpose of the voyage. Whether he has done so is a matter peculiarly within his own knowledge. The inspection which he can give, but which the shipper cannot give, for lack of opportunity, will establish whether this duty has been complied with. The whole matter is in the control of the owner. The law says, in substance, that when the owner can show he has discharged this duty he shall be relieved from errors of navigation and management on the voyage, over which he has not such direct control. It is not a case where there is either the necessity or propriety of resorting to presumptions. It is only when he has discharged the burden which the law imposes upon him, and shown that he has furnished a vessel, fit and seaworthy, or has used due diligence to that end, that the law relieves him of the liability which he would otherwise incur. This construction of the statute has been more than once announced in the decisions of this Court, recently in *International Navigation Co. v. Farr & B. Mfg. Co.*, 181 U. S., 218, 226; 43 L. Ed., 830, 833; 21 Sup. Ct. Rep., 591, in which this Court, speaking through Mr. Chief Justice Fuller, said: 'We repeat, that even if the loss occur through fault or error in management, the exemption cannot be availed of unless the vessel was seaworthy when she sailed, or due diligence to make her so had been exercised, and it is for the owner to establish the existence of one or the other of these conditions.' This case was quoted followed in the still later case of *The Southwark*, *supra*, in which it was reiterated that the burden was upon the vessel owner to show by reasonable and proper tests that the



vessel was seaworthy and in a fit condition to receive and transport the cargo undertaken to be carried, and that if, by failure to adopt such tests and furnish the required proof, the question of the ship's seaworthiness was left in doubt, that doubt must be resolved in favor of the shipper, because the vessel owner had not sustained the burden cast upon him by the law to establish that he had used due diligence to furnish a seaworthy vessel.

"While we, therefore, accept the decision of the learned Circuit Court of Appeals as to the facts in this case, we do not wish to be regarded as sanctioning any relaxation of the rule above stated, already laid down in the prior decisions of this Court. Decree affirmed."

In *Sumner v. Caswell*, 20 Fed. Rep., 252-3, the Court says:

\* \* \* "Besides the express contract that the vessel should be fitted for the voyage, there was also the warranty implied by law under the bills of lading, as well as incident to the charter and a part of every such contract, that the ship, at the time she sailed, was in all respects seaworthy and fit and competent for the sort of cargo and the particular service for which she was engaged. 3 Kent, 205; Macl. Ship, 405; Work v. Leathers, 97 U. S., 279; The Rebecca, 1 Wave, 192; The Lizzie W. Virden, 19 Blatchf., 340; S. C., 11 Fed. Rep., 903; Cohn v. Davidson, 2 Q. B. Div. 455."

In the case of *The Benjamin Noble*, 244 Fed. Reporter, 95 (C. C. A.), the Court said:

"It is, however, urged that the 'Noble' was not a common carrier, but a private carrier,



since the whole cargo belonged to appellee and the boat was not running on regular routes or held out as a common carrier, and consequently that she was not subject to the rule pointed out touching the burden of proof. Conceding though it is not necessary to decide, that the 'Noble' was a private carrier, the position of appellant is not changed; for, as we have seen, the burden of proof was not cast upon appellant. Furthermore, we see no reason for distinction between a private carrier and a common carrier as respects the question or the proofs as to seaworthiness, since the obligation of each to furnish a seaworthy boat is the same. *Sumner v. Caswell, supra*, 20 Fed., pp. 251-252; *The Planter*, 19 Fed. Case No. 11,207-A, 807-808, C. C."



*Owners Obligation Under Charter Party, Which Document Was In Force Long Before the Charterers Made Any Contract with Libelant, and to Which Libelant Was Not a Party.*

The form of charter party filed in this case, as entered into between the "owners" and the Central-American Cattle Company, Inc., provides merely a charter for the use of the ship in respect to cargo space and accommodations for passengers. The owner retains command and control over the vessel, they appoint all the officers and crew.

Under such a form of charter, as exists here, it is said by *Carver on Carriers of Goods by Sea* (Sixth Ed., p. 170, Sec. 112):

"Most commonly, however, charter-parties are made for the purpose of securing to the

charterer the *use* merely of the ship on a particular voyage or series of voyages. He does not desire to interfere with the manner in which she is to be navigated, nor is the shipowner willing to part with his control over her. The charterer is content with the owner's undertaking that the voyage shall be performed, and that the vessel's services shall be at his disposal. The whole control and management of the ship is therefore left undisturbed in the hands of the owner, who remains in possession by his servants, the master and crew. In such a case the shipowner acts as a carrier of the goods upon the agreed terms."

Speaking of such charter-parties which expressly stipulate that the master shall sign bills of lading, as required by the charterers, *Carver on Carriage of Goods by Sea* (Sixth Ed., p. 222, Sec. 156), says:

\* \* \* "Such a charter-party provides that the owner shall give the use of his ship to the charterer; and one agreed manner of doing this is, that the goods of third persons shall be carried, for the charterer's profit, if any can be got, under bills of lading to be signed by the master. The provision that the master shall sign the bills of lading is not a mere authority to him to do so, it is an agreement that he shall do so, for breach of which the owner is liable to an action by the charterer. That provision, also, is nearly always accompanied by the qualification that the bills of lading are to be signed 'without prejudice to this charter-party'; which indicates that the shipowner is meant to be bound by the bills of lading, though not so as to affect his rights against the charterer. And as will

appear later, whether or not there is the above qualification, the charterer will be bound to indemnify the shipowner for any liabilities imposed on him by the bill of lading signed by the master at the request of the charterer, in excess of the liability under the charter-party.

"The meaning, then, of the stipulation that the master shall sign bills of lading seems to be that the shipowners shall, through the master, contract with shippers, for the charterer's benefit, and not that the master shall do as agent for the charterer. The master signs not exactly as agent of the charterer, but because he is bound to sign by reason of the charter-party."

Other text-book writers can be quoted, and numerous cases cited in support of the foregoing, but this Court, of course, having determined these long-settled principles of law, the only reason for setting out the above citation is because of claimant's contention.

But, after all, it is an indisputable fact that the cargo was lost by reason of the unstable, unseaworthy condition of the ship, which existed prior to and at the time of the commencement of the voyage. A condition due to the failure of the master of the ship, to have and keep the ship in proper condition for sailing, and not to have sailed in its then unseaworthy condition. The neglect of the master in this respect was the neglect of the owners' agent, who was especially appointed by the owner to discharge this and other duties appertaining to the care and navigation of the ship; and his negligence in the premises certainly imposes a liability upon the ship and its owners to the same ex-

tent that fault on his part in causing a collision with another vessel would have made his vessel answerable to cargo owners for damage sustained by them to their cargo through such fault.

Petitioners respectfully pray that the judgment of the lower Court be set aside, and that this Honorable Court will decree judgment in its favor for the measure of damages suffered in the premises.

JOHN D. GRACE,  
M. A. GRACE,  
EDWIN H. GRACE.

New Orleans, La., December 23, 1925.

23,

## ADDENDA

Although it conclusively appears that the ship was in a grossly unseaworthy condition at the time her master received petitioner's cattle on board, and executed a bill of lading therefor, signing for the charterer, the Honorable, the Circuit Court of Appeals for the Fifth Circuit, in their decree which appears in 297 Fed. R. 813, says:

"As above shown, the bill of lading was subscribed by the Cattle Company only, 'by Tho. Johannsen, master S/S Fort Morgan.' That signature indicated the absence of intention to bind anyone but the charterer by the bill of lading. The act of the master in so subscribing the instrument, does not indicate a purpose thereby to bind the ship or its owner." (Tr. p. 470.)

But directly opposed to the above holding, the United States Circuit Court of Appeals for the Second Circuit, with Judges Ward, Hough, and Manton, presiding, in *The Esrom*, 272 Fed. R. p. 269, after a most learned and exhaustive review of the authorities, says:

"If the voyage is begun, the vessel must carry the goods to destination on the terms agreed by the shipper and the charterer; for when the vessel starts upon the voyage, by implication, there is a ratification and adoption by the ship of the charterer's contract with the shipper."

"\* \* \* Before sailing, the vessel's owner is protected by his opportunity to refuse to carry the goods on the terms agreed by the charterer before the voyage is commenced."

## II.

In the last quoted case it is further said:

"The ship may be held liable in rem for damages to the cargo even though no bill of lading or contract of affreightment was signed by the master."

The lower court is again in direct conflict with other Circuit Court of Appeals, as will presently be shown, when it holds that:

"The appellant is not entitled to hold the ship or its owner liable for a breach of duty imposed by the contract for the carriage of the cattle, as appellants' contract for such carriage was with the charterer, the Cattle Company, alone." (Tr. p. 470.)

But the breach of duty referred to by the court was the unseaworthiness of the ship, itself, which was warranted by her owners to be tight, staunch, strong and seaworthy in every respect; a warranty, too, which is implied by law when not expressed.

Respecting this point the United States Circuit Court of Appeals, for the Second Circuit, before Judges Lacombe, Ward and Rogers, presiding, in the case of *Olsen v. United States Shipping Company* (213 Fed. R. pp. 20-21) held:

"It would, in our opinion, be unwise and dangerous to impair the implied warranty of seaworthiness of the ship, herself. The district judge rightly held that the steamer was unseaworthy on leaving Ship Island. The jettison was caused not by the sea peril, but by her own instability. It makes no difference whether this was due to the amount

### III.

of the stowage of the deckload alone or also to the fact that the largest ballast tank could not be filled. All these matters were under the absolute control of the master and it was his duty to see that they were right. It was no excuse to him that the charterers did the loading; insisted upon his taking the deckload or that surveyors certified that the ship could do so safely.

The lower court cites Carver on Carriage by Sea and a case referred to by said author, but those citations were inadvertently erroneously cited, as neither citation bear on this case. But Carver on Carriage by Sea is, in fact, directly in line with the C. C. A., 2d Circuit (Sect. 17). The case of the Posnan, the only other decision referred to by the lower court, is directly, squarely against the opinion of the lower court. (See the Posnan, paragraph 12, 276 Fed. R. 432.)





FILED  
JAN 14 1926

W. M. R. STANSBURY  
CLERK

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. 537 135

ARMOUR & COMPANY,

Petitioners,

*versus*

FORT MORGAN STEAMSHIP COMPANY, LTD.  
(CLAIMANTS AS OWNERS OF THE STEAM-  
SHIP "FORT MORGAN"), THE AMERICAN  
SURETY COMPANY OF NEW YORK,  
AND THE CENTRAL AMERICAN  
CATTLE CO.,

Defendants.

Supplemental Brief for Petitioners in Reply to De-  
fendant Brief.

On Writ of Certiorari to the United States Circuit  
Court of Appeals, for the Fifth Circuit, from their  
Final Judgment Rendered March 18, 1924, Affirming  
the Judgment of the Lower Court (29 Fed. R., 813).

John D. Grace,  
M. A. Grace,  
Edwin H. Grace,  
Attorneys for Armour & Co.,  
Petitioners.



## SUBJECT INDEX.

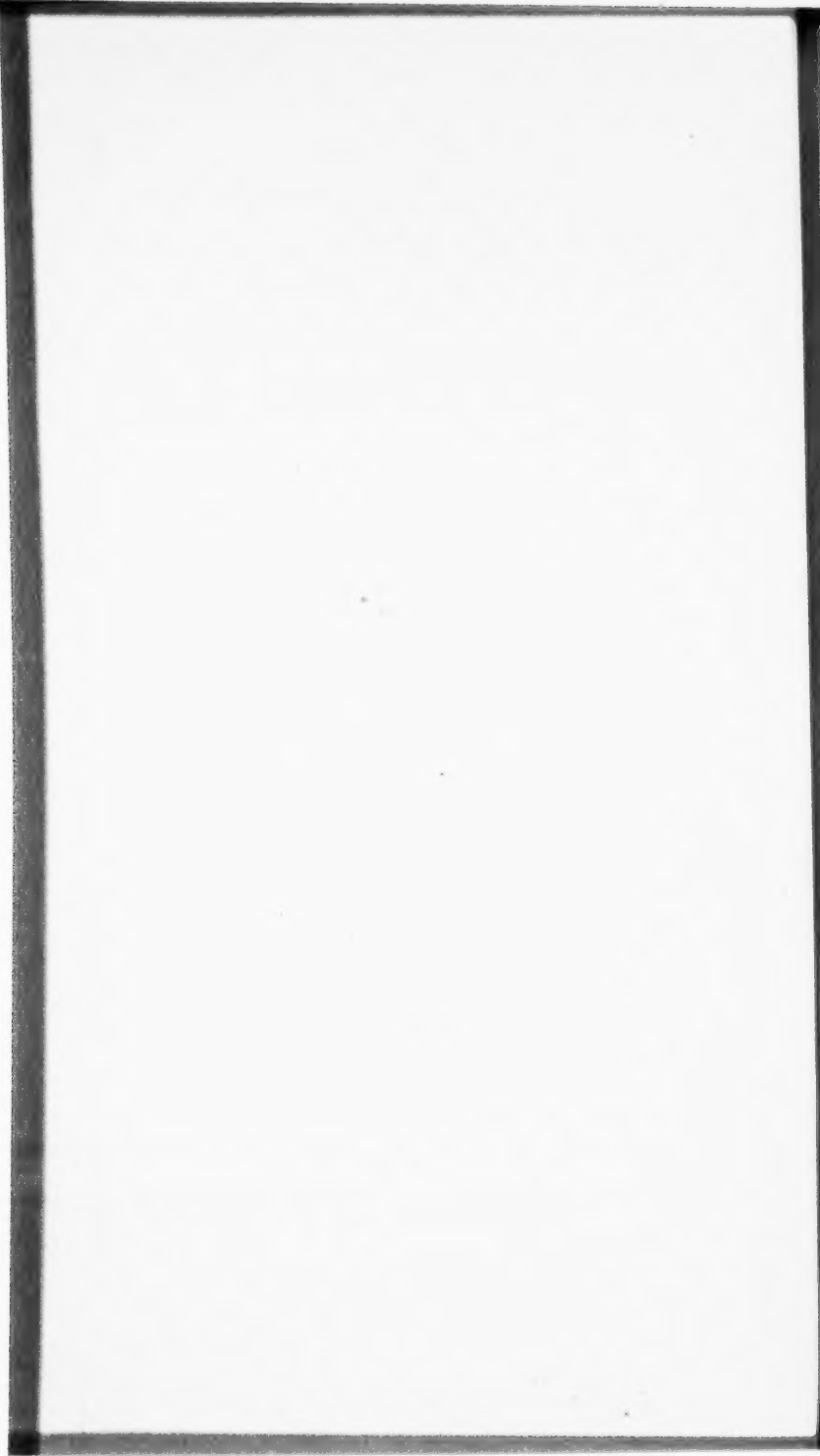
### *Answering Defendant Fort Morgan Defenses.*

	Page.
I. Jurisdiction: Suit is on an ocean bill of lading, of a common carrier, executed by the Master for the charterer; and not on any other contract .....	1
II. Fort Morgan S. S. Co.'s suggestion that Armour & Co. were not owners of the cattle discussed .....	5
III. Fort Morgan S. S. Co.'s contention because Armour & Co. paid the Cattle Company for the cattle it sold them, that such payment bars a right to hold the ship responsible for damages it occasioned those cattle because of the ship's unseaworthiness .....	7
IV. Fort Morgan S. S. Co.'s effort to show by a surveyor whom they produced, condition of ballast tanks, who could not, of his own knowledge, swear thereto; while they failed to produce any of the ship's engineers who had positive knowledge thereof and had advised Lloyd's representative that certain of said tanks were leaky and some unfit for use .....	10
V. Fort Morgan S. S. Co.'s contention abuse of the ship by shipper and by charterer....	13

### LIST OF CASES.

Esrom, The, 272 Fed. R., 266.....	4
Euripides, The (D. C.), 52 Fed., 161.....	4
Goddard, The T. A. (D. C.), 12 Fed., 174.....	3-4
Hiram, 101 Fed. Rep., 138, pp. 140-141.....	3
New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How., 344; 12 L. Ed., 465.....	4
Peytona, The, 2 Curt., 21, 27.....	4
1 Pritch. Adm. Dig., p. 492, Sec. 123.....	3
Waterwitch, 19 How. Pr., 241, affirmed in 1 Black, 494 .....	4

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In the  
SUPREME COURT OF THE UNITED STATES  
October Term, 1925.

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No. 537.

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Armour & Company,  
*versus* Petitioners,

Fort Morgan Steamship Company, Ltd. (Claimants as  
Owners of the Steamship "Fort Morgan"), the  
American Surety Company of New York,  
and the Central American Cattle Co.,  
Defendants.

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Supplemental Brief in Answer to Points Raised by  
Fort Morgan Steamship Co.

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I.

*Jurisdiction.*

Defendant, the *Fort Morgan Steamship Company, Ltd.*, in raising the question of jurisdiction, most conveniently overlook the following facts:

(a) That this suit is brought solely against the S/S Fort Morgan, by the shipper, who is also consignee, upon an ocean bill of lading, executed by the master of that ship, a common carrier, for the charter of the vessel, for transportation of four hundred twenty

(420) head of cattle from Port Limon, Costa Rica, for delivery at Jacksonville, Fla.

(b) That, by the master's very receipt of libelant's cattle on board for said transportation, there was created an implied warranty that she was fit and strong, and in every way equipped, manned, etc., to make her seaworthy for the voyage undertaken, for proper delivery of said cattle at destination, which warranty was breached in this case. It was on account of damages occasioned by that breach, *and not otherwise*, this suit is brought.

(c) That there is not sought to be recovered herein any damages or losses on any contract or agreement other than on the bill of lading. The recovery sought herein is confined solely and exclusively to the damages which resulted as a consequence of the gross unseaworthiness of the said steamship, existing in her prior to and at the commencement of the said voyage by her undertaken, which unseaworthiness necessitated on her part an absolute, complete abandonment of the voyage she so undertook to perform, and a return to port in an almost capsized condition, within a few hours after her departure from said port of loading.

(d) Said defendants set up as a bar to admiralty jurisdiction a contract which they, themselves, have brought in, (Tr. 78-83) which was made between the Cattle Co. and Armour & Co., for sale of cattle f.o.b. the carrying vessel, at Port Limon, which contract further, as a several, distinct maritime obligation, provides that after the consummation of such sale has occurred, to then transport said cattle for Armour & Co. to Jacksonville, Fla., at "ocean freight" of \$25.00

per head, subject to exception from certain maritime perils. *But that contract is not sued on in this case. No recovery is sought for under that contract. No relief of any kind is prayed for herein under that contract. The Fort Morgan Steamship Company is not a party or privy to that contract. It does not in any way or to any extent prevent Armour & Co. from electing to proceed against the Steamship Fort Morgan for damages occasioned by and through her gross unseaworthiness.* Nowhere, in any document in this cause, is that contract referred to, excepting, and solely excepting, that *the ocean freight charge* for the transportation of the cattle would be—as in said contract stipulated—\$25.00 per head of cattle.

The Court will not confuse the above referred to contract (Tr., 78) with the Live Stock agreement (Tr., 83), referred to in the Bill of Lading which is purely maritime, and maritime alone.

(e) Said defendant in setting up the said contract made solely between Armour & Co. and the Cattle Company for two distinct several obligations—one for sale of cattle, the other obligation for transportation of cattle after the sale is consummated, hence, after all, a several distinct maritime transaction, conveniently overlooks the right, the long, well-settled right of the petitioner, as shipper and owner, to elect to proceed against the ship for its own defaults. As was well said in *The Hiram*, 101 Fed. Rep., 138, at pp. 140-141:

“The ship, however, would be answerable for any negligence that caused damage to the cargo after its shipment on board; that is to say, it would be answerable to the shipper

upon the implied contract to transport safely, and that there should be no unreasonable delay in commencing and prosecuting the voyage after the cargo had been received by the vessel. 1 Pritch. Adm. Dig., p. 492, Sec. 223; The T. A. Goddard (D. C.), 12 Fed., 174; The Euripides (D. C.), 52 Fed., 161. And 'a person whose goods are transported by contract with a charterer, in a chartered vessel, navigated by her owners, is not limited, in case of loss or injury to his goods, to his remedy against the charterer on the express contract with him, but may directly pursue the vessel or her owners, who have caused the loss.' The T. A. Goddard, *supra*; New Jersey Steam Nav. Co. v. Merchants' Bank (6 How., 344, 12 L. Ed., 465)."

*The Hiram*, 101 Fed. R., 138, at pp. 140-141.

See, also, *The Waterwitch*, 19 How.

*Pr.*, 241, affirmed in 1 Black, 494.

*The Peytona*, 2 Curt., 21, 27, etc.

Then, too, it would seem clear that the ship is bound by the bill of lading executed by her master, for the charterer, otherwise, in any event, as stated by the Circuit Court of Appeals, Second Circuit, in *The Esrom*, 272 Fed. R., p. 266:

"The ship may be held liable *in rem* for damages to the cargo, even though no bill of lading or contract of affreightment was signed by the master. \* \* \*

"The ship is therefore answerable for any negligence that causes damage to the goods, and is answerable to the shipper, or to his vendee upon the implied contract to transfer safely, whether a bill of lading is issued or not."



For the owners to attempt to repudiate the bill of lading executed by the master for the charterer, they are in the situation of having their master accept goods for transportation without giving any bill of lading for them at all, and would thereby become bound by an implied contract to transfer safely, with an implied warranty of the ship's fitness to make the voyage.

We believe the foregoing remarks sufficient to clearly advise the Court of material facts on this question of jurisdiction.

## II.

### *Fort Morgan Steamship Company's Suggestion That Armour & Co. Were Not Owners of the Cattle.*

While said defendant suggests that the cattle lost and injured on board of the Steamship "Fort Morgan," due to her unseaworthiness, did not belong to libelant, and that ownership would not have vested in libelant until their delivery at Jacksonville, Fla., with much ingenious argument thereon to support said unjustified suggestion, said defendant most conveniently overlooked the fact that such contention is most positively disproved by each and every one of the shipping documents, receipts, consular document, etc., filed in this cause. For instance:

(a) Defendant conveniently overlooks the fact that when the cattle were delivered f. o. b. the steamship "Fort Morgan," with their weight previously ascertained by the Cattle Company, who was vendor, and by Armour & Co., who was vendee, that Mr. Mitchell, the agent of Armour & Co., did then and there,

and on behalf of Armour & Co., as purchaser, accept delivery of the said cattle, and stipulated their weight as 346,302 pounds, live weight, for which cattle at the agreed price of five cents per pound, said Armour & Co. then stood responsible and legally obligated to pay. That "received and accepted" receipt acknowledging said delivery is printed in full in Tr. 187.

(b) Said defendant still further conveniently overlooks the fact that the ocean bill of lading, executed by the master of the Steamship "Fort Morgan," for the charterer of the vessel; at the time when the cattle was delivered on board of his steamship, and by the said master counted, recites that Armour & Co. is the actual shipper, and that said cattle were accepted by the ship for delivery to said Armour & Co., at Jacksonville, Fla. That by this bill of lading the ship stood obligated to carry those cattle for the said shipper and make delivery thereof to them as therein specified. But because of her unseaworthiness, operating as a breach by her own and owners implied warranty of seaworthiness, she failed, and occasioned the damages complained of.

(c) Said defendant still again conveniently overlooks the fact that Armour & Co., by and through their said representative, having accepted delivery of the said cattle f. o. b. the steamer (Mitchell, Tr., 187), said representative of Armour & Co., as such, did then, at Port Limon, Porto Rica, appear before the United States Consul and make affidavit of the ownership and physical condition of the said cattle as required by the statutes of the United States necessary to enable said steamship to land said cattle in the United

States; and in said affidavit said agent of Armour & Co. did make oath that the said cattle then on board the Steamship "Fort Morgan," at that place, was the property of libelant, Armour & Co. That affidavit appears in full in the transcript at page 186.

(d) Said defendant still further conveniently overlooks the fact that Armour & Co., having accepted the cattle f. o. b. the steamer at Port Limon, as their own property, did take out insurance in their own name, for their own use and benefit, to protect themselves from loss or damage happening to the said cattle by or through "stranding, sinking, burning or fire, or collision." (Frisbe, Tr., 166.) Said policies of insurance were offered in evidence. (Tr., 166.)

### III.

*The Fort Morgan Steamship Company Also Sets Up As a Bar to Petitioner's Right to Recovery Herein the Fact That Petitioner Acquitted Its Obligation to Pay Its Vendee the Price It Owed for the Cattle and Made Other Business Arrangements.*

Because of the losses sustained by libelant to its cattle almost immediately after the voyage commenced libelant withheld the draft which they were obligated to deliver to the Central American Cattle Company, Inc., at New Orleans, upon the cable advice which they had received of the delivery f. o. b. the aforesaid cattle and their live weight, intending to make due investigation into the cause of the loss. The Cattle Company, however, brought suit before such investigation was concluded, to recover the price of the cattle and stipulated freight, contending that under their contract

the sale was consummated when the cattle were delivered f. o. b. the steamer and that said sums were due and owing to them. They were the proper parties entitled to collect for their own account whatever freight might be payable, because, as charterers of the Steamship "Fort Morgan," they had paid to the owners of said vessel a lump sum charter of sixteen thousand dollars (\$16,000.00), per calendar month, and, in turn, were accorded the right to collect the passage money and freight for passengers and on consignments taken and shipped on said vessel. Armour & Co. shortly thereafter entered into a compromise settlement of said suit with the American Cattle Company, wherein they paid for the cattle and made agreement to share in the expenses and profits, if any, to be derived from the sale of such cattle which survived and were cared for and treated, when taken over by the Captain of the Port at Port Limon, "for the account of whom it might concern," when the master voluntarily abandoned the voyage, returned to port, and there abandoned the cattle shipped on his vessel. *The freight was not paid.* This new contract above referred to embodied certain other provisions for future business between the Central American Cattle Company and libelant. But libelant did not relieve the charterers of or from any liability in the premises which might flow from them to the ship or her owners. So, whatever rights, if any, the owners of the Steamship "Fort Morgan" had against the Central American Cattle Company, the charterers of said boat, under the terms and conditions of the charter party, continued in full force and effect. This fact is clearly established by the petition of the Fort Morgan Steamship Company, which brought the said Central American Cat-

tle Company, Inc., into this very case as a co-defendant, so that, under the terms of the charter party, the owners of said vessel might have judgment over against the said Central American Cattle Company, Inc., if the Steamship "Fort Morgan" should be condemned and her owners be required to pay libelant's demand, if the charterers might justly be held responsible therefor. In their answer to that petition the Central American Cattle Company does not set up that they have made any kind or character of contract or agreement or settlement with libelants, which would release them from any obligation to answer over to the ship to make good libelants' losses, if they should be found responsible therefor, but, on the contrary, came squarely forward and denied the right of the owners of the "Fort Morgan" to recover from them, because, so they plead, the loss and damage was occasioned, not by reason of any fault on their part, but solely because of the unseaworthiness of the Steamship "Fort Morgan" existing at the time this cattle was received on board, prior to and at the commencement of her voyage. We urge it is too plain to admit of argument that the rights or interests of the owners of the "Fort Morgan" have not been impinged upon, or affected by reason of libelants making settlement with the Central American Cattle Company of the matters dealt with in said transaction between the parties referred to and that the said separate, independent agreement between the parties thereto does not affect the responsibility of the ship for her own defaults and consequent damage.

## IV.

*Defendant, Fort Morgan Steamship Company, Seeks to Show Seaworthy Condition of Vessel's Tanks, Not By Her Engineers, Who Were in Charge Thereof, For None of Them Were Produced, But by Mr. Olsen, a Surveyor, Whose Deposition in the Main Is Based Upon Reports to Him.*

Mr. Olsen, for defendant, who manifestly made only a superficial survey, if *survey* it can be called, by which defendant is seeking to show a good condition of ballast tanks, testified as follows:

(R. 383.) A. The nature of an examination like that would be, to fill the tanks, open the valves to the outside, so that the water could freely run in, and have a pressure on the tank to the water ballast line. \* \* \*

But on same page this witness, further testifying, says that he personally made no soundings of the tanks, that he had a man going around to sound the tanks, who reported they were full.

On Tr., 384 says:

A. As far as I remember, we were all in the cabin together with the captain and that was reported to me.

Q. And you took that report as true and acted on it?

A. Yes.

Q. So that, of your own knowledge, you don't know really what water was in there?

A. I couldn't swear what was in there exactly, but they reported that they were full.

At Tr., 386 he testifies that at the subsequent examination (none of which were for classification of the vessel):

A. Yes, sir; there was one leak found between the afterpeak tank and the No. 3 tank just leading into the valve, between the afterpeak tank and the Number 3.

Q. Just what, if anything, any of the officers may have done, or any one from shore may have done, to remedy any leaks or anything of that sort, that, of course, you don't know?

A. No, sir.

On redirect at Tr., 391, Mr. Olsen, the surveyor, was asked if he had found any patches on the tank, and he answered:

A. I don't know of any. Of course I didn't uncover all of the tanks.

On recross-examination this witness testified, Tr., 393, that the "ballast tanks are covered with wood ceiling, about two and a half inches thick, as a rule," and that he never had any of those tanks uncovered. At Tr., 394, that at a subsequent survey he found a leak in No. 3, and says that this leak was not found until after they had cleaned around where it existed. "It was not leaking before, I didn't find the leak before it had been scaled, it had been covered with a whole lot of dirt and scale and foreign matter which had accumulated around there." At Tr., 395, speaking of this leak that he found, after an evidently indifferent character of inspection, says that this leak was not serious then as the water would go down in



the bottom of the ship. "It would have gotten serious if it came up over the tank too, of course."

So, we submit, that the production by the Fort Morgan Steamship Company of Mr. Olsen in the character of a surveyor should avail them little, considering his lack of personal knowledge of the condition of the tanks, and the fact that they would go so far to refer to this so-called survey and do nothing at all to bring in the engineers and the chief officer of that ship, whom it appears were familiar with those tanks and reported on their leaky condition (see full survey report, Tr., 324-327), wherein three surveyors, acting on behalf of Lloyd's within a few days from the return of the "Fort Morgan" to Port Limon, upon the abandonment of her voyage, say:

"On sounding we found fourteen inches of water in No. 1 tank and upon inquiry as to why this tank had not been pumped full, learned from the Chief Officer and Chief Engineer that this tank had never been filled to its capacity since they had been on the ship, the Chief Officer and Chief Engineer stating that they understood it has leaked when filled."

They also report, officially, that according to the statements of the chief officer and chief engineer, "when vessel sailed from this port at 6 P. M., November 29, 1917, forepeak tank was empty, No. 1 tank contained 14 inches of water, afterpeak tank empty, not in condition to be used for water." The learned counsel for defendants indicate that they are at a loss



what it is petitioners expect this Court may infer from defendants' neglect to put the chief officer and chief engineer on the stand, or some other person in the engineer's department familiar with the condition of those tanks, but to satisfy that curiosity we submit that this Honorable Court has repeatedly held that the failure of a party to produce such witnesses in matters of this kind, or to produce lookouts or helmsmen or deck officers in matters of collision, etc., in the absence of any reasonable excuse for such failure gives rise to the presumption that if those officers or employees were produced that their testimony would not be favorable to the ship.

## V.

*Defendant, Fort Morgan Steamship Company, Have Seriously Urged That Their Ship Was Abused.*

Certain it is that Armour & Co., petitioners, were under no obligation whatsoever to add to, or take from, or do anything of any kind, or nature, to facilitate the ship in providing pens to safeguard the transportation of their live stock. Still further, that defendant, at page 28 of their brief, quote Article 25, Tr., 27, of the bill of lading, as follows:

"Live birds, or animals and live stock are received at the sole risk of shipper, consignee and/or assigns, the vessel not having any special equipment therefor."

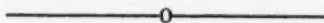
But they forget to tell the Court that at the time that bill of lading was issued all of the cattle had been received on board and had been placed in pens exist-

ing on board, so that the question of suitable cattle pens was not a point under consideration at the time of the issuance of that bill of lading by the master of that ship.

Not only does the contract between Armour & Co. and the Cattle Company, which the Fort Morgan Steamship Company, themselves, have pulled into this case, show that the duty and obligation to provide cattle pens, etc., rest solely and exclusively upon the Cattle Company, and that Armour & Co. were in no way concerned or required to do anything whatever in respect to their putting up; but the testimony of the president of the Cattle Company is to the effect that he, personally, was there and that it was the Cattle Company, and Cattle Company alone, which put up those cattle pens, and that in the execution thereof he employed all the help he could get from whatever source he could secure it, on account of scarcity of labor at Port Limon, and had even paid the master of the Steamship "Fort Morgan" for his services in staying aboard of the ship and helping to look after their proper construction, and so, also, had engaged the services of the gentleman, who would go as supercargo for Armour & Co. when that voyage commenced, but the testimony of Mr. Mitchell, at Tr., 148, shows that this supercargo took that employment for his own account and not for the performance of any service due by Armour & Co.

Certain it is that the bill of lading distinctly provides, at all events, that "animals and live stock are received" by that ship, and in the receipt of that stock by a common carrier there is an implied warranty

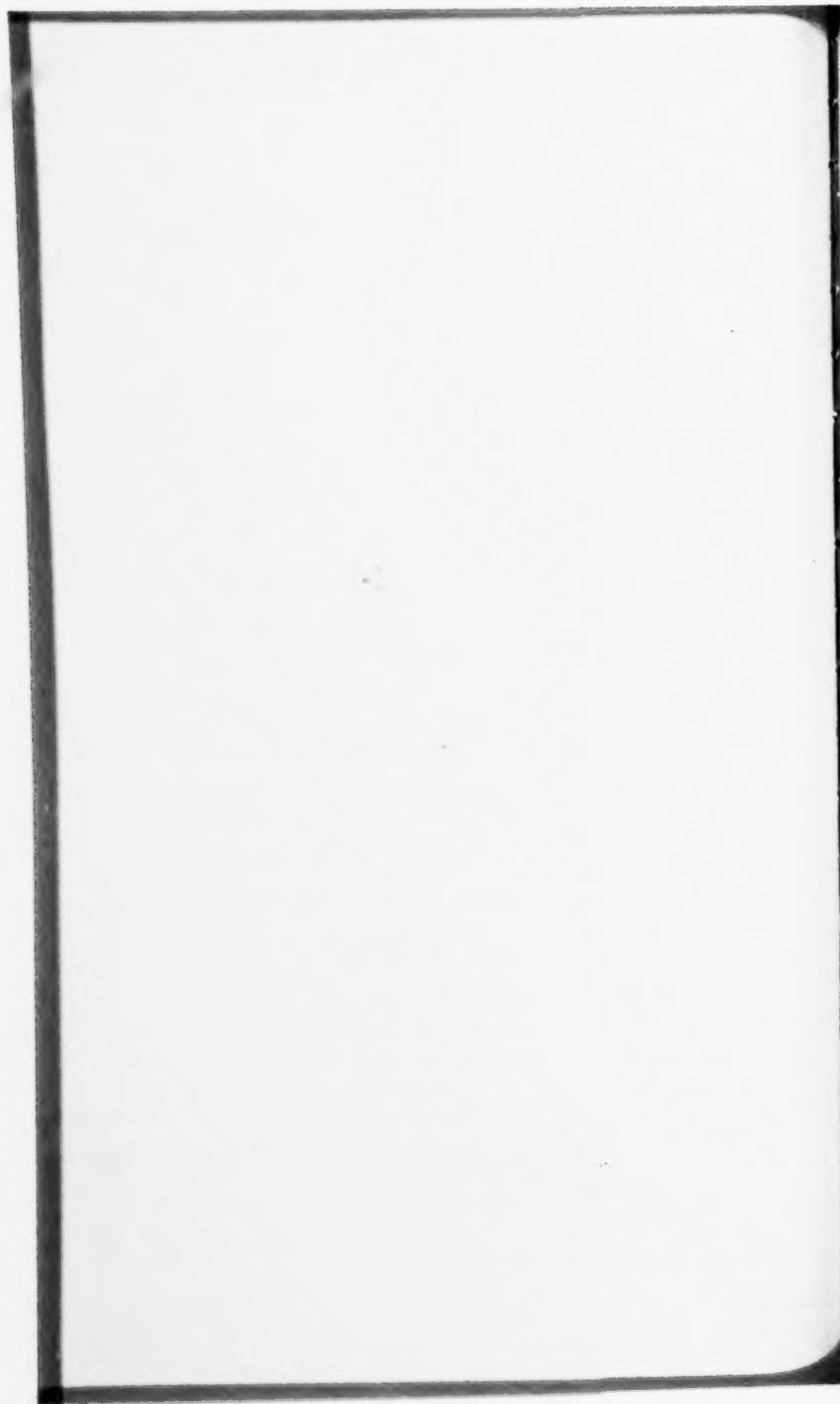
that she was prepared to at least take due care during the voyage of goods and merchandise they had so received for transportation.



We would not have filed this supplemental brief but for the fact that the Fort Morgan Steamship Company have set forward seriously such contentions, which are calculated to create some confusion respecting the real issues.

Respectfully submitted,

John D. Grace,  
M. A. Grace,  
Edwin H. Grace,  
Attorneys for Armour & Co.,  
Petitioners.



JAN 4 1926

WM. R. STANSBURY  
CLERK

IN THE  
**SUPREME COURT OF THE UNITED STATES**  
OCTOBER TERM, 1925.

No.  135

ARMOUR & COMPANY,  
Petitioners,

*versus*

FORT MORGAN STEAMSHIP COMPANY, LTD.,  
(CLAIMANTS AS OWNERS OF THE STEAM-  
SHIP "FORT MORGAN"); THE AMERI-  
CAN SURETY COMPANY OF NEW  
YORK; AND THE CENTRAL  
AMERICAN CATTLE CO.,  
Defendants.

On Writ of Certiorari to the United States Circuit  
Court of Appeals, for the Fifth Circuit, from their  
Final Judgment Rendered March 18, 1924,  
Affirming the Judgment of the  
Lower Court.

George Denegre,  
Victor Leovy,  
Henry H. Chaffe,  
Attorneys for Fort Morgan Steamship  
Company, Appellee.



## SUBJECT INDEX.

	Page.
(1) References to Opinions of Lower Courts in this Case .....	1
(2) List of Authorities Cited.....	2
(3) Statement of Grounds of Jurisdiction.....	2
(4) Statement of the Case.....	5
(5) Argument .....	17
(a) Contract and Settlement.....	17
(b) Want of Jurisdiction in Admiralty....	23
(c) Abuse of the Ship.....	27
(d) Special Stipulations and Quantum.....	97

## I.

## References to Opinions of Lower Courts in this Case.

This case comes before this Honorable Court on writ of *certiorari* (on petition of Armour & Co.) to the United States Circuit Court of Appeals, Fifth Circuit. The opinion of that Court is published in 297 *Federal Reporter*, p. 813, under the title of *Armour & Company v. Fort Morgan Steamship Company*. That opinion was rendered on appeal from a decree by Judge Rufus E. Foster, Judge of the United States District Court, Eastern District of Louisiana. The opinion of Judge Foster is printed at pages 437, *et seq.*, of the transcript. We do not find that it has been published.

## II.

## LIST OF AUTHORITIES CITED.

Crenshaw v. Pearce, 37 Fed., 432.....	17
Field Line (Cardiff) v. Sou. Atl. S. S. Line, 201 Fed., 301 .....	21
Grant v. Poillon, 20 Howard, 162.....	22
National Steam Nav. Co. v. Int. Paper Co., 241 Fed., 861 .....	33
Portland, etc., Co. v. Luckenbach S. S. Co., Inc., 130 Fed., 860.....	33
Rees v. Barrington, 2 Ves., p. 520.....	13
Sun Co. v. Philadelphia, etc., Co., 244 Fed., 580..	25
The Ada, 250 Fed., 194.....	28
Luckenbach S. S. Co. v. Gano Moore Co., et al., 298 Fed. Rep., 343.....	24
The Belfast, 7 Wallace, 642.....	21
The Hiram, 101 Fed., 142.....	29
The Wildenfels, 161 Fed., 864.....	28
Turner v. Beacham, Fed. Cas. No. 14,262.....	28
W. R. Grace & Co. v. Luckenbach S. S. Line, 248 Fed., 953 .....	27
West Indies Co. v. Chicago, etc., Co., 249 Fed., 339	19

## III.

## Statement of Grounds of Jurisdiction.

This cause was initiated by a libel filed by Armour & Co. against the Steamship Fort Morgan, in the United States District Court, Eastern District of Louisiana. Claim was filed by the Fort Morgan Steamship Company, Ltd. (our client herein), which, after various exceptions filed, answered and called in the Central American Cattle Co., Inc., which filed answer. After evi-



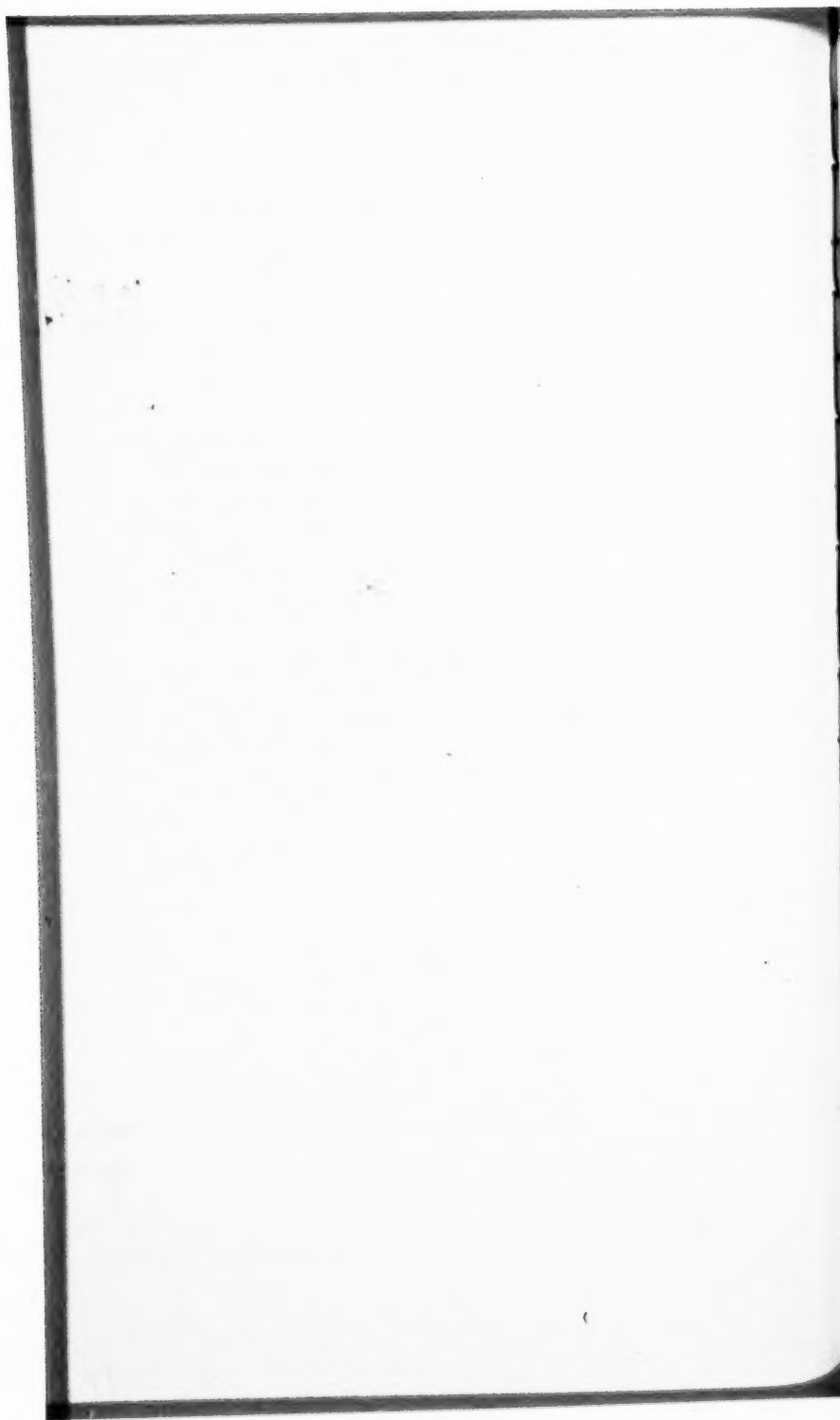
dence taken and argument had decree was entered dismissing the libel. Armour & Co. appealed to the United States Circuit Court of Appeals for the Fifth Circuit, which affirmed the decree. Armour & Co. then applied for a writ of *certiorari*, attacking the jurisprudence as stated in the opinion of the Circuit Court of Appeals; and this writ was granted.

Tr p 42  
Rec 18

In its answer our client, the Fort Morgan Steamship Company, Ltd., urged, in addition to the defense on the merits, that the matter was not one of admiralty jurisdiction; being dependent upon a contract of sale with which the contract of transportation relied on is too closely interwoven. On this point Judge Foster said at the close of his opinion (Tr., p. 442):

"It was also urged on behalf of the ship that the contract between Armour & Company and the Cattle Co. was one of sale as well as transportation, and therefore not cognizable in admiralty. With this also I am inclined to agree."

This point is discussed hereafter under the heading of Argument, Section (b).



In the  
SUPREME COURT OF THE UNITED STATES  
October Term, 1925.

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No. 537

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Armour & Company,  
*versus*

Petitioners,

Fort Morgan Steamship Company, Ltd., (Claimants  
as Owners of the Steamship "Fort Morgan");  
The American Surety Company of New  
York; and the Central American Cattle  
Co.,

Defendants.

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On Writ of Certiorari to the United States Circuit  
Court of Appeals, for the Fifth Circuit, from their  
Final Judgment Rendered March 18, 1924,  
Affirming the Judgment of the  
Lower Court.

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IV.

STATEMENT OF THE CASE.

This was a libel brought in the United States District Court for the Eastern District of Louisiana by Armour & Company, appellant herein, against the Steamship "Fort Morgan." The libel annexed a bill of lading (Tr., p. 9), issued by (Tr., pp. 29, 30) the

Central American Cattle Company, Inc., (the charterer of that ship) in the name of that Company for the transportation of 420 head of cattle from Port Limon to Jacksonville. The libel alleges in substance that, shortly after leaving port, the vessel listed very heavily so as to kill about half of the cattle and seriously damage the rest, the vessel being obliged to return to port and the voyage being abandoned; all this taking place within a few hours after leaving port. The voyage was never resumed and such of the cattle as survived were subsequently shipped by other vessels with which we have no concern.

The libel being *in rem*, and the bill of lading having been issued by the charterer (Tr., pp. 29, 30) and not by the owner (the Fort Morgan Steamship Company, Ltd.) the libel is, necessarily, based upon the familiar lien against a ship (no matter to whom belonging) to secure claims growing out of transportation contracts made by her charterer; a lien similar, for instance, to that which the owner of premises exercises, for unpaid rent, against the property of strangers, lodgers, etc., on the premises. We state this thus specifically because it is of importance in regard to some of the issues in the case.

The shipment and subsequent disaster took place at Port Limon; the loading of the cattle, issuance of the bill of lading and subsequent proceedings having been under supervision of a representative of the charterer, the Central American Cattle Company, Inc., (hereafter referred to, for convenience, as the Cattle Company) and a supercargo employed by Armour & Company (Tr., pp. 233, 239).

All this is stated from evidence developed in the record; our client, the present owner of the Fort Morgan, having had no knowledge of the matter at all; having bought in entire innocence of of even the existence of any such claim or of any of the facts. (Tr., pp. 370, 459.) We do not mention this as having any technical effect on the issues of the cause, but simply as preventing any possible attempt to obscure those issues by any attempt at invective connected with the accident. We mention it, also, because it seems simpler to present the history of the facts as they became known gradually to the new interests, when the seizure of the SS. "Fort Morgan" made it necessary to bond that ship and prepare such responsive pleadings as might be proper.

It may be convenient at this point to dispose briefly of what is much emphasized in the brief of opposing counsel in this Court and was much emphasized in their briefs in other Courts, i. e., the scantiness of testimony (indeed, on both sides), and the nonproduction of logs, etc., as to the occurrences on this very brief voyage of the Fort Morgan.

We have never understood, nor have opposing counsel explained, just what inference they seek to have drawn from this state of the record; and counsel do not make the matter clear in their brief in this Court, stating on page 34 that they "leave to your Honors to determine what inference arises therefrom."

Any sinister inference would be difficult for the reason not only that Armour & Company had on board on the trip in question a supercargo, Mr. Wilkinson, (they took no evidence until after he died, Tr., p. 147), but also their counsel produced and filed (Tr., p. 188,

libelant's exhibit "C 2") a document which contains very full statements signed by all on board, in the presence and at the instance of port authorities. As to the logs, etc., no call was made for them and without such call they would not have been legal evidence in our favor. As will be seen by the story of the developments hereinafter, it took time for the new purchasers of the Fort Morgan to discover the real facts, and in the meantime, before the cause was at issue, the officers had disappeared (Tr., p. 395). But their disappearance was of no importance as the testimony of the master (Tr., pp. 229, *et seq.*), covers all the occurrences on the ship and is entirely undisputed; and, as above stated, Armour & Company knew fully all the facts through their supercargo, Mr. Wilkinson, and had before them and put into the record full statements of all on board. In fact, the issues in this cause do not consist of disputes as to occurrences on the voyage in question, nor, indeed, to any substantial extent of disputes of fact at all. The undisputed story is entirely sufficient.

Stated briefly, the real story as it was gradually discovered by the new purchasers of the Fort Morgan began with a certain agreement of October 3, 1917 (Tr., p. 78), a month or so before the occurrences in question, between Armour & Company and the Cattle Company whereby the Cattle Company was to sell to Armour & Company 25,000 head of cattle in South America (beginning with 1100 head), take the cattle to Port Limon and transport them from Port Limon to Jacksonville, the Cattle Company stating in the agreement (Tr., p. 80) that it would charter ships to enable it to do so.

The Cattle Company then chartered the Fort Morgan under a charter (Tr., p. 70) bearing the title "Time Charter—West Indies Fruit Trade," having a clause therein (Article 11, Tr., p. 76) permitting the erection of a light fruit deck to carry a load of fruit, naturally a light weight. The Cattle Company took the Fort Morgan to Port Limon, and there, under the supervision of its representatives and of a supercargo employed by Armour & Company, heavy cattle were loaded on a deck authorized only as a fruit deck (Tr., p. 233, p. 313) and the ballast tanks of the ship, obviously intended as such (Tr., p. 377) (the charter described the ship as having water ballast, Tr., p. 71) were transformed into fresh water supply for the cattle (Tr., pp. 254, 337), with the consequence of diminution of ballast in accordance with the needs of the cattle and not the requirements of the ship.

Desperate attempts were made in the testimony and argument to free Armour & Company from complicity in these proceedings; but the fact remained that Armour & Company, by its agreement, had arranged with the Cattle Company to charter and equip ships (Tr., p. 80); that it was accordingly bound to notice of the charter and that the proceedings were contrary thereto, and that the master had no authority to vary the terms thereof. And its own supercargo was present throughout and had the water drawn for the cattle (Tr., p. 337). It is useless, therefore, to dwell on the point that that supercargo actually supervised the deck erection (p. 233), or the claim that *quoad* that point he was hired by the charterer (Tr., p. 402), or on the fact that the master was paid fifty dollars for his participation. All knew of what was being

done and all were bound to know that it was contrary to the charter.

Desperate efforts were also made to show that this sudden "unseaworthiness" of the Fort Morgan, with her new deck and converted ballast, was really due to leaks in the ballast tanks. Considering that the tanks were and had been filled, used and part emptied for the use of the cattle, and no one mentions seeing a leak, this claim was rather belated; but it was set at rest by the testimony of Mr. Olsen, who put an end to all previous surmises and rumors by examining the tanks. There was no leak (pp. 375, 376).

But these discoveries paled beside the further discovery, verified by an examination of the records of the Civil District Court of the Parish of Orleans (disclosing a suit hereinafter discussed), that the allegations of the libel as to what had passed between Armour & Company and the Cattle Company and as to the situation and alleged losses of Armour & Company were very far, indeed, from reflecting the true facts.

As above explained, the claim in the libel against the ship was necessarily based on the principle of admiralty law that a ship, no matter to whom belonging, is a pledge to secure the payment of obligations of the charterer to shippers; and it was, therefore, of vital importance to the owner of the ship that the relations between charterer and shippers, of which the shipowner (especially because a recent purchaser) could know nothing directly, should be set out fully and frankly. According to the libel, the contract between shipper and charterer was simply a bill of lading issued by the charterer in its own name; the shipper



being the owner of about 420 head of cattle, and having suffered losses by the disaster consisting of a large part of \$16,800, the alleged shipping value of the cattle, plus \$10,500 of freight, which the libel alleged had been paid. As the bill of lading annexed stated (Tr., p. 28, foot of page) "freight prepaid," this allegation meant that the freight had been paid in advance; but it is useless to refine on that point, as in fact, it had not been paid at all.

Opposing counsel strenuously urged that we should be forbidden to search into the real facts; his position apparently being that a ship is bound by any fictitious situation a charterer and shipper might claim to exist between them. Adherence to this position, which would be equally unfounded in law and good conscience, became impossible, however, as the matter continued to develop. Attempt to prove payment of freight resulted in an answer by libelant's first witness that it had not been paid before sailing (the stipulated time) and finally that it had not been paid at all, but had been "settled by a compromise agreement with the people with whom we had contracted for this cattle." (Tr., p. 111.)

It was thus made impossible to avoid looking into this settlement and into the original contract on which based, which was the original October contract for sale and transportation to which we have heretofore referred in relation to its provisions that the Cattle Company should charter ships and that the Cattle Company (not the ship-owner) should transport the cattle; and in respect to the notice it thus gave Armour & Company that any ship would be a chartered ship,

dealings with which must be limited by charter provisions.

We now refer to that contract, thus brought into the testimony, in connection with said settlement (before this litigation was begun) of the controversy growing out of the disaster in question; and especially, in connection with that settlement, to the provisions thereof as to payment of price and freight.

If Armour & Company had made these payments at the stipulated time, that is, when the voyage began, it is quite true that Armour & Company when the disaster occurred would have been in the financial situation of having paid out \$16,800 to the charterer for the cattle, and \$10,500 freight, or a total of \$27,300, against which, if the voyage were considered as abandoned, Armour & Company would have had on hand at Port Limon the cattle which had survived the disaster. And the same would of course have been true as to their financial position if Armour & Company, having in fact made no payments at all at the time of shipment, had thereafter, in the settlement hereinabove mentioned, paid the \$27,300 and received no benefits; although, of course, any claim of right to thus act retrospectively and retroactively at the expense of the absent shipowner and create a lien on the ship long after the voyage would hardly seem to require serious consideration.

The libel substantially averred the first of the above suppositions, averring ownership of the cattle in Armour & Company, by claiming that Armour & Company had suffered the damages alleged, and specifically averring that freight had been paid, annexing a bill of lading stating that it was prepaid. When it

developed by the mouths of libelant's own witnesses that these statements were not true, its Chicago counsel, Mr. W. C. Kirk, took the stand (Tr., p. 168) in attempted explanation, and claimed that while it was true that at the time of the disaster and thereafter up to the time of the settlement Armour & Company had paid nothing and suffered nothing, yet that in the settlement, it had repented and paid then as if it had paid on shipment; thus attempting to treat the matter of settlement as not a settlement, but a mere question of date of payment, claiming that it simply constituted doing later (regardless of acquired knowledge and interests of others) what might have been done at the time of shipment.

Without discussing legal difficulties, it will be enough to point out that neither of these propositions (that is, neither the account given in the libel nor the theory of Mr. Kirk) accords with the facts. As to payment at the time of shipment or of the disaster, the libel is, of course, entirely inaccurate. Armour & Company had paid at that time neither price nor freight and had suffered nothing. As to the settlement, if it had consisted in Armour & Company paying \$27,300 (the \$16,800 price and \$10,500 freight) and receiving nothing, it is true that it would have put them in the same *financial* situation as if these payments had been made at the time of shipment, except as to the matter of interest. To claim that it would have put them in the same *legal* situation; that making payments after a disaster and the abandonment of a voyage, without the knowledge or consent of the ship concerned, would have put them in the same relation to the ship as if these payments had been made innocently and in contemplation of the voyage is a claim

which we should not have imagined could be urged if it were not evidently the contention of our opponents. But it is useless to discuss it, as it is not true that Armour & Company, in the settlement, paid out \$27,300, and it is not true that in the settlement Armour & Company received nothing.

On the contrary, the evidence developed that the situation at the time of the settlement was that the Cattle Company, having received nothing, had brought suit against Armour & Company for \$35,805.50 (Tr., p. 460) made up of \$17,315.10, price of cattle, \$10,500 freight and \$7990.40 damages on account of expenses in connection with the remaining 680 cattle out of the 1100 head which Armour & Company had agreed (by the agreement of October 3, 1917) to take and pay for.

Armour & Company either because of the facts as shown by the evidence in this case, or possibly because of further facts known only to Armour & Company and the charterer (Armour & Company took no evidence, until after their supercargo, Mr. Wilkinson had died, Tr., p. 147) did not fight the case to a conclusion, but made an agreement to pay \$19,000, which if attributable to that account alone, would mean that a deduction was made of \$16,805.00 from the amount sued on; in settlement of the very claims it is now making.

But the deduction was in reality larger. The \$19,000 was not paid solely in settlement. Armour & Company's Chicago counsel testified that one motive for making the settlement was that otherwise deliveries of cattle would stop; and the settlement agree-

ment reflects that fact (p. 183), as the \$19,000 was to be paid, one-half on the sailing from New Orleans and the other half on the sailing from Port Limon of the first of the new ships. Attributing only half of the \$19,000 to this consideration and accordingly figuring \$9500 as paid in connection with the shipment settlement, would leave, deducting that figure from \$35,800, a total of over \$24,000 of deductions obtained by Armour & Company in settlement of the very claims it is now making against the ship (taking into consideration about \$2000 on account of the fact that the Cattle Company was given a half interest in the remaining cattle).

But amounts are really unimportant; the important fact being that a settlement was made which was expressly final; the parties so regarding it, to such an extent that from that time to this Armour & Company have made no claim against the charterer, the Cattle Company, which had participated in the settlement, even when we afforded every opportunity by calling in that Company under Rule 59 in Admiralty. The only attack since the settlement has been directed against the ship, which was not informed of the settlement.

As we have mentioned, we called in the Cattle Company under Rule 59 in Admiralty, stating that if by any possibility a decree could be rendered against us in favor of Armour & Company, the same decree should be rendered in our favor against the charterer for its abuse of the ship. That would have been sorry satisfaction, as the proceeding against the Cattle Company was not *in rem*, and it accordingly gave no bond, and the record is silent as to its present financial situ-

ation. But the fact that such a result would flow from a decree against us in favor of Armour & Company is one of the minor points indicating the impropriety of disregarding the settlement; for in that event the net effect of the decree would be simply to rip up a settlement which was deliberately made, Armour & Company having obtained in the meantime all the benefits of the new trade arrangements which so largely formed a motive therefor.

We have gone into this matter at more length than would perhaps seem necessary, for the reason that the fact that Armour & Company were indebted to the charterer for the price of cattle, and the further fact that they had paid no freight, necessarily made the settlement with them of their claims for damage, etc., a matter of deduction and not of payment, which clouds a little, at first glance, the fact of settlement and it was further clouded by the fact that the desire of Armour & Company to make the new trade arrangements made the deduction smaller than it would otherwise have been. If Armour & Company had paid for the cattle and had paid the freight, and desired no new arrangements and a large cash payment had been made to them for their claims, it may be possible that this libel would still have been brought, as the shipowners would not have known of the settlement; but it hardly seems possible that it would have been pressed after the shipowners had discovered the facts. The passing confusion injected by the mode of settlement and the inclusion of the new trade arrangements probably account for insistence of hope; in the face, however, of the fact that no explanation or answer concerning the settlement has been suggested other than the manifestly unsound one mentioned above; an ex-

planation unsound in law and far from accord with the figures.

In the Court below opposing counsel said little on the matter of settlement, little on the question of the abuse of the ship and nothing on jurisdiction; dealing at great length with details of the disaster, and meeting the issues of settlement, abuse of the ship, and jurisdiction, with significant silence.

In this Court much the same course has been followed, with the exception that there is now an exceedingly belated admission (p. 45) that the claim for freight was in error and libelant in fact now claims only \$15,752.01 (brief, p. 44) instead of \$31,500 (Tr., p. 5) or \$28,450 (Tr., p. 7). If libelant were really entitled to recover anything, these errors as against a new purchaser having no knowledge whatever of the matter, might have had serious consequences if not discovered in time by it.

## V.

### ARGUMENT.

(a) Contract (October 3, 1917) and settlement (January 18, 1918).

Libelant's counsel took the position, throughout, in objections to testimony, and in briefs and argument below, that the contract for the purchase and transportation of the cattle in question and the settlement thereof had nothing to do with the case. That was rather an extraordinary position as a matter of law, as it would make a ship (belonging to a third party) a pledge, not for valid, genuine and subsisting obli-



gations of its charterer, but for whatever obligations, originally fictitious or subsequently settled, might be made up as against the ship between the charterer and any shipper. For instance, if there were (as counsel seems to claim) a lien for the return of prepaid freight in case of disaster, and the bill of lading had not contained the provisions on that subject which it does contain, a ship might be held liable for the return of freight which had never been in fact paid to the charterer, or had been paid after disaster. But we need not analyze the situation farther for when it became necessary for counsel to take his evidence he found it utterly impossible to maintain any such position. At Chicago counsel produced his main witness, Mr. Munnecke, the manager of the department in charge of this matter. At the very beginning (Tr., p. 110) counsel asked the following question and received the following answer:

Q. As a result of any contract or agreement that was made, did the Central American Cattle Co. deliver any cattle for account of Armour & Co.?

A. They delivered them to the steamer, if that is what you mean. They did not complete delivery. We contracted for the delivery of this cattle at Jacksonville, Fla. They delivered them to the steamer at Port Limon.

And on page 111 the following question and answer occur on direct examination:

Q. As a matter of fact, has the freight been paid?

A. Well, the freight—it was not paid, no; but it was later settled by compromise agreement with the people with whom we contracted for the cattle.



On cross-examination we asked Mr. Munnecke (Tr., p. 121) to what agreements and arrangements he had been referring, and after considerable discussion between counsel the witness answered (Tr., p. 123) by saying:

A. I referred only to the original contract.

Q. Of what date?

A. Of October 3rd—whatever date that is in October.

Without considering, therefore, the well-settled jurisprudence that under arrangements of this kind for the carriage of cattle or other goods, whereby ships are to be procured and the goods carried, bills of lading issued at the time of each shipment (even when bills of lading are issued at all) are incidental to the main contract (merely pledging the ship to secure the charterer's obligations) and are to be considered in reference thereto (249 Fed., 339, and *Crenshaw v. Pearce*, 37 Fed., 434), it does certainly seem too plain for dispute that when counsel's witness undertook to testify to a contract and when that witness also undertook to testify to a compromise and settlement, his counsel cannot very well claim thereafter that the contract and the compromise and settlement have nothing to do with the case. It is true that the attempt had been made in the libel to handle the case as if there had been no contract and as if there had been no settlement; but in making the proof it was impossible to keep from discussing these facts. Moreover, the bill of lading annexed to the libel had expressly referred to the contract (Tr., p. 28).

Mr. Kirk, Chicago counsel for the complainant, then testified, stating that the Cattle Company had made

demand on Armour & Company for payment for 420 head of cattle at a price of 5 cents per pound (which would have been \$40 per head, the shipping price—see Munnecke, page 10), and \$25 per head freight (which would have been \$10,500), thus making a total of \$27,300. In fact, the Cattle Company had filed suit and the petition, of which we filed a copy in this case (Tr., p. 460) shows that there were additional claims on account of expenses, making a total of \$35,805.50.

Mr. Kirk stated that he was at first of the opinion that the charterer might not be able to collect this amount from Armour & Company "because of the fact that under the agreement they were to charter and equip a suitable vessel." Mr. Kirk does not say whether he ever became convinced of any error in this position as a matter of law, or whether he ever became convinced thereafter one way or the other on the issue as to whether the vessel was suitable or if bad, how it had become so, and the connection of Armour & Company thereunto.

In this situation Mr. Kirk, who was necessarily confronted with these possibilities, and, moreover, actuated by a desire to obtain certain important trade agreements, compromised the case, receiving a very large deduction from the total claim and securing the trade arrangements which have doubtless been carried out and from which it is to be supposed (it was the general history in war times) large profits were reached. Having thus compromised and settled the issues, the attempt to hold the ship as a pledge as if they had not been settled seems to require no long discussion. If the attempt had been made by a suit

against the charterers seeking to repudiate the settlement while holding on to the valuable trade agreements for the future, it would have been sufficiently inequitable; but being an attempt at repudiation by asserting against a pledge belonging to a third party, claims which had been settled, its chances of success manifestly rested only on the chances of continued ignorance of the owners, first as to the abuse of the ship, and second as to the settlement.

That our statement of the legal principles is correct needs few references to prove. That the charterer is the contractor for carriage and that under bills of lading issued by the charterer the ship is the pledge to secure these obligations with the condition that they must be real and still existing obligations, was explained as long ago as "*The Belfast*," 7th Wallace, p. 642. And it is hornbook law and indeed inevitable in reason that compromise and settlement of a principal obligation releases all sureties and pledges.

References, such as were made below by counsel, to such cases as *Field Line (Cardiff) v. South Atlantic S. S. Line*, 201 Fed., 307, merely confuse the matter. Question sometimes arises, as in such cases, as to whether a master in signing, does so, *quoad* shippers, on merely the charterer's behalf (because obligated by the charter to sign bills of lading) or also on behalf of the shipowner, thus creating a personal liability of the shipowner. Such cases, while not always expressly so stating, are cases, as we understand it, where the master has simply signed the ordinary ship's bill of lading, simply signing as master. It is hard to see how there could be doubt in such a case as the present where the master expressly signed for the charterer,

and used the charterer's bill of lading with its name on it. But we say that such references merely confuse the matter because this is not a suit *in personam* against the shipowners, and what the Court has to deal with is simply the lien against a ship given by the maritime law to secure the contract of transportation and claims thereunder. Where such claims are unfounded, or have been settled, the point is that a lien to secure them could not have existed or has ended. *Sublato fundamento cadit opus.*

If it were possible (and it is not) to consider the settlement in any other light, it would not help libellant. If all statements in the document as to settlement were obliterated, as well as all testimony to that effect, it would still be impossible to claim that by a payment made months after the whole matter had terminated and the vessel had returned to New Orleans, and our clients had innocently come into the matter, Armour & Company could obtain a lien of any kind against the ship; and except in that settlement they did not pay and have never paid a single cent.

The counsel seemed to appreciate this difficulty, as in his brief below, after elaborately insisting upon eliminating the contract and settlement, confining the matter to the libel, he asked that the Court give him an opportunity to prove his damages thereafter. That was an extraordinary proposition. No such agreement or arrangement or stipulation had been made, and counsel had had full opportunity to prove his damages, if any recoverable damages existed. The plain fact seems to us to be that if counsel eliminates the contract and settlement he cannot possibly claim any damages whatsoever, for the simple reason that the

testimony develops that up to the time of the settlement in question, and except as contained in that settlement, Armour & Company never paid out a cent and were not damaged at all; and if they had simply let matters alone that situation would have continued, but, as Mr. Kirk says, for business reasons they concluded to pay out a considerable amount of money to the cattle company. That was their privilege, but such a transaction, long after the entire voyage in question had been abandoned and the Fort Morgan had returned to New Orleans (and our clients had innocently bought in), could not possibly affect adversely the situation of the Fort Morgan or its owners, or create a lien upon that ship. "For it is," said Lord Loughborough in the leading case of *Rees v. Berrington*, 2 Ves., p. 520, "the clearest and most evident equity not to carry out any transaction without the privity of him who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him."

(b) Jurisdiction.

This point is, of course, intimately involved with the discussion which has just preceded. If counsel could have succeeded in keeping the contract and settlement out of the case, the situation upon the issue of jurisdiction might have been very different. As appears from the opinion in the *Ada* case, 250 Federal, page 194, as well as by the old cases of *Grant v. Poillon*, 20 Howard, 162, and *Turner v. Beachem*, Federal Cases No. 14,252 (Mr. Justice Taney, afterwards Chief Justice), admiralty is very sensitive as

to the entire purity, in the maritime sense, of the contracts with which it will attempt to deal, and (as said in the first case mentioned), a contract of sale will taint an entire contract and take away the admiralty power even to enforce the provisions relative to charter; and to be enforceable a contract must be wholly maritime; and, as said in the last-mentioned case, even although a contract be maritime, yet if it has been so blended with another, not maritime, that the Court cannot decide one with justice to both parties without disposing of the other, the Admiralty Court cannot take jurisdiction. See also *Luckenbach S. S. Co. v. Gano Moore Co., et al.*, 298 Fed. Rep., 343.

The contract in this case, so far from being a pure contract of transportation, so closely resembled a mere contract of sale that Munnocke, libellant's manager, described it on page 4 of his testimony, instinctively, as a contract to deliver these cattle at Jacksonville; evidently meaning a sale of cattle deliverable at Jacksonville. The basis for this statement, of course, was that while the cattle company engaged to deliver the cattle in the technical sense at Port Limon, the cattle company was nevertheless to proceed to carry them to Jacksonville (the contract containing elaborate provisions as to transportation); and, moreover, the delivery at Port Limon was necessarily to be, as Mr. Kirk points out, on a vessel suitable for the carriage of this cattle to Jacksonville. Armour & Co. were careful not to agree that such delivery could be made by putting the cattle on the wharf at Port Limon. They were anxious, evidently, to tie up the contract of sale with the contract of transportation.

Even if the bill of lading were considered entirely by itself (which would be extraordinary, as the contract and bill of lading are both in the name of the cattle company, and made by it, and both contain provisions governing the transportation), the elementary law is that the ship is pledged as security simply for whatever might be due the shipper for failure to carry out that contract made by the cattle company and evidenced by the bill of lading. It would be plainly impossible for the Court to fix any such figure (if such liability did exist) without considering both the contract and settlement to which we have referred. The witnesses found it impossible, at Chicago, and dragged in the contract and settlement with every breath. Not a cent was paid by Armour & Co. except in pursuance of the settlement and of the terms thereof. The cattle were subsequently handled in accordance with that settlement. And as to the contract, neither the bill of lading (which expressly refers to the contract as for rate of freight), nor the settlement, can be considered without referring to and construing the contract; for the simple reason that the settlement was based upon the contract, and, as Mr. Kirk expressly states, in considering whether to make the settlement he considered the terms of the contract.

It is very plain, therefore, that what is before the Court is an issue as to a mingled contract of sale and transportation, and as to a lump sum settlement made of such contract; and we submit that it is plain that no such issues can be handled by the Court under its maritime jurisdiction. Mr. Terriberry, counsel for the Cattle Company, evidently appreciated this point, as he sued in the Civil District Court.



This subject is fully treated in the above mentioned case (*supra*) of "*The Ada*," 250 Fed., p. 194, wherein the Court of Appeals (New York) reversed the District Court, pointing out, on page 196, that "All the provisions of the agreement show that the main intention was a contract of sale" and that a contract of sale, even of a ship, is not enforceable in admiralty and taints the entire contract and takes away the admiralty power even to enforce the provisions relative to charter.

The Court added: "It is well established that a contract enforceable in admiralty must be wholly maritime." *Grant v. Poillon*, 20th Howard, 162. In that case it was held that the master and part owner could not maintain a suit in admiralty for freight against shippers with whom he was a partner, because a partnership contract would have to be settled. In *Turner v. Beachem*, Fed. Cases No. 14,252, Mr. Justice Taney held to the same effect, saying:

"And I consider it to be a clear rule of admiralty jurisdiction that, although the contract which a party seeks to enforce is maritime, yet if he has connected it inseparably with another contract over which the Court has no jurisdiction, and they are so blended together that the Court cannot decide one with justice to both parties, without disposing of the other, the party must resort to a court of law, or a court of equity, as the case may require, and the admiralty court cannot take jurisdiction of the controversy."

See also the very late case of *Luckenbach S. S. Co. v. Gano Moore Co., et al.*, 298 Fed. Rep., 343.



(c) Abuse of the Ship.

As we have stated, the agreement between Armour & Company and the Cattle Company provided expressly that the Cattle Company would carry the cattle from Port Limon to Jacksonville, and that it would charter ships for that purpose. Accordingly, Armour & Company were put on notice that any ship used would be a chartered ship and were bound to see to it that what was done should be within the rights given by the charter.

Therefore, the Fort Morgan, in pursuance of this agreement, was chartered by the Cattle Company. We may mention in passing, for the sake of exactness, that the charter was not directly from the Fort Morgan Steamship Company, the owner (pp. 350, 355), but it was practically so, as it was testified (Tr., p. 361), that the intermediary, the Gulf Coast Plantation Company, was practically the same as the Fort Morgan Steamship Company. (See *248 Fed. Rep.*, p. 953.)

By the agreement above mentioned (Tr., p. 80), Armour & Company were put on notice that any ship provided would be a chartered ship. They were bound to take notice of the charter. The charter was specially pleaded in the answer and it was pleaded that the changes made for the purpose of carrying live stock were unauthorized by the charter. The charter was proven by the Los Angeles testimony. (Tr., pp. 351 and 458.) It is headed "Time charter West Indian Fruit Trade" and contained a provision (Article 11, Tr., p. 76), "That the steamer shall be provided with loose planks, two to two and one-half inches thick to make a platform or deck, all through the vessel's hold, and also provided

with beams for such temporary platform or deck to rest on, BUILDING THE SAME STRONG ENOUGH TO HOLD TIERS OF FRUIT" (capitals ours). And it may be added that the bill of lading issued contained this provision (Article 25, Tr., p. 27), "Live birds or animals and live stock are received at the sole risk of shipper, consignee, and/or assigns, the vessel not having any special equipment therefor." As the ship was not a common carrier, all such conditions were valid as written.

The Cattle Company (see *The Wildenfels*, 161 Fed., 864) and Armour & Company nevertheless proceeded, at their own risk, as we take it (see 244 Fed. Rep., 580), to alter the ship by considerable constructions of cattle deck and pens. The importance of the provision that the temporary deck should be "strong enough to carry fruit" in connection with the present case lies in the fact that fruit is a light cargo and placed so high the ship would not affect its stability, whereas cattle are quite different. Captain Olaf H. Olsen, a well-known expert, who has represented the Norwegian Veritas for many years, testified as follows (Tr., p. 379):

Q. What would be the effect of loading them (the fruit decks) with cattle in place of fruit, on the stability of the ship?

A. The ship will be cranky and apt to heel over.

Moreover, the ship is particularly described in the first article of the charter-party (Tr., p. 71) as "having water ballast." This is important, in view of the claims in the various letters, protests, etc., that were filed on behalf of libelant that the ship should have (in addition) fixed ballast if ever to be again so used;

(see *The Hiram*, 101 Fed. Rep., top of p. 142) and, further, in view of the fact that under the conversion made under the agreement between the Cattle Company and Armour, her water ballast tanks were changed in their purpose from ballast tanks to cisterns from which to draw water for cattle.

The excuses for these performances are, first, that Burge, the then president of the Fort Morgan S. S. Company, knew, in a general way, that the ship was to be used for cattle, and second, that the master approved. As to the first we do not represent Burge, who, as appears by his own testimony, sold to the present stockholders the stock of this company without telling them of this litigation. (Tr., pp. 370 and 459. Even as against Burge, his mere general knowledge that planks were to be taken aboard and the ship used for cattle, could not well be taken as evidence of consent to a parol change in the charter or an assent to the changes made; but surely our clients cannot be considered as in any way, either in equity or in law, bound by parol variations claimed to have been based on undisclosed knowledge of their very reticent vendor. It is quite enough to seek to bind them by the contracts which the Company had made. They are certainly entitled to stand by the charter, Armour & Company being bound to know, as above stated, that the ship was a chartered ship, and, indeed, as all the Chicago testimony discloses, being very well acquainted with the whole affair and well knowing that the Cattle Company owned no ships. Moreover, there is not even a claim that Mr. Burge knew that cattle would be loaded on the fruit deck or the ballast tanks depleted for the cattle.

As to the assent of the master, inasmuch as he was hired (see testimony of Whilden, page 402), to assist in the work, that feature is out of the case. He had no authority in any event to agree to changes in the ship or the charter; but when he undertook to serve two masters, he could certainly no longer commit one of them as against the other. We may add that the ship was thereby deprived of her only friend, as it will appear from Mr. Whilden's testimony (page 410) that the various officials, whose names adorn the statements filed (but who did not try to testify), were, with one exception, employees of the United Fruit Company, whose manager is a director of the Cattle Company. The United Fruit Company finally appeared as the purchaser of part of the cattle (Tr., p. 136); a variation in their business not accounted for.

To resume the narrative, Armour & Company and the Cattle Company, after altering the ship as aforesaid to suit their purposes, and hiring the master to assist, set sail and met with early disaster.

There is absolutely nothing to show that there was anything the matter with the ship, leaving out of question the additions placed on her by the charterers. The testimony of Captain Olsen, the surveyor (p. 374), shows that the ship was in perfect condition, and there is not one single statement under oath to the contrary. If the master failed to fill the tanks, or emptied the tanks, it would have been, under other circumstances at most, an error of navigation for which the ship, under the bill of lading and the Harter Act, would not have been responsible, for under the charter-party the tanks were described as ballast tanks, and could be filled or emptied at any time, as a matter of judgment

in navigation. (Tr., pp. 378, 274.) But in this case the tanks had been converted by the scheme of the Cattle Company and Armour & Company into cisterns for cattle, and the master had been silenced by being hired to supervise the work of building the extra deck.

As to the rumor (there is not one word of testimony) that one of the tanks had been leaky, we produced the testimony of Captain Olsen, the surveyor, pp. 374, *et seq.*, who testified that the tanks were in entirely good condition. This was a survey which these rumors, indicated in letters, etc., in the file, suggested ought to be made; and when made it killed that rumor. We call it a "rumor" for there is not one word of any one under oath stating a leak existed, nor of any one stating that he heard any one admit that a leak existed. As heretofore explained, the officers other than the master had disappeared long before the case was at issue and all attempts to trace them failed; but the master and Mr. Burge testified very fully, denying the alleged leak, and the master stating (Tr., p. 292), and there is no contradiction, that this was the first voyage of the officers who were claimed to have said that such a leak (alleged to be a small leak near the top of one tank) "had always existed." The charge of fault in tanks was a plain and desperate afterthought, in the hope of still more misusing the unfortunate ship, and we note that not one of the persons who are said to have heard the alleged admissions have ever been asked to testify.

(d) Special Stipulations and Quantum.

In view of what we have said above as to the three points (1) Misuse of the ship, (2) Compromise of the contract, and (3) Want of Jurisdiction, it seems idle

to spend much space or time on the discussion of either special stipulations or *quantum*. But as we believe that a brief should cover all points, we mention these points briefly.

As above pointed out, libelant sued on the bill of lading and in any point of view, if he has any claim at all, is bound by its provisions. These provisions are set up in special articles of our answer. Article 22 of the answer, setting up the provision as to ship not having facilities for live stock and no liability therefor, has already been discussed. Article 21 pleads that the provision as to written notice of claim *was not complied with* (see 249 Fed., 588), and the testimony so shows. Article 23 gives the ship the benefit of any insurance. The Chicago testimony shows that Armour & Company simply abandoned the insurance on the unfounded theory that the ship had met with no disaster. Article 20 refers to three provisions giving the ship the benefit of the usual Harter Act protection of nonliability for errors in navigation if due diligence is used to make the ship seaworthy. The evidence of Captain Olsen and of Captain Jacobsen shows such diligence and the ship was, in fact, seaworthy, the only real question being as to consequences of the arrangement by charterers and Armour & Company to put in a new deckload of cattle on it and use the ballast tanks for cisterns.

On the matter of *quantum*, the only damages claimed by the Chicago testimony to have been suffered by Armour consisted of three parts, and no more. One of these consisted of the price to be paid for a share in the damaged cattle, long after the shipwreck and with full knowledge thereof, and expenses in taking

care of them. This was a voluntary speculation on the part of Armour entered into after the entire matter with which this suit is concerned was ended. The payment for a share in the injured cattle was, therefore, a new agreement, expressly stated as settling the old one and entering into new obligations which had no reference to the Fort Morgan.

The second item of this Chicago proof consisted of an attempt to attribute a part of the payment to "freight." The attempt to claim that a lien could be created on a ship by such a payment, long after the voyage, is, we believe, unprecedented. We may add, in passing, that if the freight had been in fact paid, then or previously, it would have been irreclaimable, so that a claim for its return could in any event have no foundation. The bill of lading expressly provided that "freight shall not be reclaimed under any circumstances." That clause is entirely good, as decided in *National Steam Navigation Co. v. International Paper Co.*, 241 Fed., 861; see also 130 Fed., 860. If Armour & Company really at the date of settlement chose to pay freight, with the full knowledge they had of all the facts, we can see no imaginable ground on which they could get it back. But the idea that after a shipwreck, an arrangement can, under any circumstances, be made between owners of goods and the charterer whereby the owner can hand in "post-paid" freight and then seize the ship to get it back is a novel idea. Ships have suffered from freight prepaid to charterers, but we have never before heard of the post-paid freight proposition. In the brief filed in this Court we understand the claim for freight is abandoned.



The third and last item of the Chicago testimony is the alleged profit that would have been made. In other words, the excess of estimated destination value over invoice value; this being calmly claimed in face of the express provisions in the bill of lading that the ship should not be liable for anything over the invoice value. (The invoice value was never paid; but it is used as a basis for calculating expected profit.)

We have referred to these points because they would be part of the case if there were any case; but considering that Armour did not pay either freight or price, and, in fact, up to the settlement agreement had paid nothing; considering that this settlement agreement was made after the shipwreck and that every dollar paid out thereunder was paid voluntarily and according to his own witnesses' statement, largely from a desire to get future business; that the contract was a mingled contract of sale and carriage not within admiralty jurisdiction; and that the alleged unseaworthiness, if existing, was the result of unauthorized alterations in the ship, we think that the Court will not be troubled with these additional points, but will feel that the libel must be dismissed on any one of the three main points and the innocent purchasers of Mr. Burge's stock freed from these unwarranted as well as entirely unexpected claims.

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Counsel for Fort Morgan Steamship  
Company, Ltd., Appellee.





# SUPREME COURT OF THE UNITED STATES.

No. 135.—OCTOBER TERM, 1925.

Armour & Company, Petitioners, vs. Fort Morgan Steamship Company, Limited, et al.	}	On Writ of Certiorari to the United States Cir- cuit Court of Appeals for the Fifth Circuit.
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[March 1, 1926.]

Mr. Justice BRANDEIS delivered the opinion of the Court.

This libel was filed on January 25, 1918, by Armour & Company against the steamship Fort Morgan in the federal district court for eastern Louisiana. Recovery was sought for loss and damage to a shipment of 420 head of cattle received by the ship at Port Limon, Costa Rica, for delivery at Jacksonville, Florida. The charge was that unseaworthiness had caused her to list so heavily as to compel return to port and abandonment of the voyage, and that thereby half of the cattle were killed and the rest seriously injured. The libel alleged that the vessel was engaged as a common carrier between the ports named; that the cattle belonged to the libelant; that the bill of lading signed by the master was issued after delivery of the cattle on board. The copy of the bill of lading annexed to the complaint was signed "The Central American Cattle Co., Inc. By Thomas Johannesen, Master S.S. Fort Morgan." It recited: "Freight prepaid as per contract subject to Live Stock Agreement."

The owner made claim, impleaded the Cattle Company, and showed that the actual transaction was very different from that set forth in the libel. The shipment was an incident of a contract made October 3, 1917, by the Cattle Company with Armour & Company to procure in Central American countries about 25,000 head of cattle and sell them to Armour & Company; to assemble these from time to time at Port Limon for rest, inspection and loading; to charter and equip two steamers; and by means of these vessels to transport the cattle from Port Limon to Jacksonville and make

delivery there. The contract provided further for attendance of an Armour representative at the inspection, grading, weighing and loading at Port Limon; that the vessels should carry only cattle for Armour & Company; and that a supercargo representing them should have supervision over the care of the cattle during the voyage. It fixed the price per pound to be paid for different grades of cattle and the freight per head; and provided that payment of the purchase price and the freight be made at New Orleans upon receipt of cable advice from the Armour representative.

The Fort Morgan had been chartered by the Cattle Company. She listed when she left Port Limon and had to return to port and abandon the voyage. But she had been seaworthy when delivered to the Cattle Company as charterer and was thereafter. The loss is claimed to have resulted from the abuse of the ship by the Cattle Company, under the supervision of Armour & Company's supercargo. The charter party, entitled a "Time Charter—West India Fruit Trade," provided the privilege of and facilities for erecting a light fruit deck to carry a load of fruit. At Port Limon she was, without the consent of the owner, converted into a cattle ship. On the deck, authorized as a fruit deck, cattle pens were constructed and the heavy cattle were loaded. Freight had not been paid when the bill of lading issued; nor was it ever paid. No payment for the cattle was ever made under the contract. After the voyage was abandoned, the Cattle Company brought suit against the Armours at New Orleans. Later the parties entered into an agreement to settle their differences out of court. The compromise provided for a new trade arrangement; for holding on joint account the surviving 200 head of injured cattle then at Port Limon; and for the payment by the Armours of \$19,000 upon performance by the Cattle Company of conditions set forth in the new agreement. Seven days later this libel was filed. There was no reservation of right under the bill of lading, or of any rights against the ship. Through investigations incident to the defense the owner first learned the facts.

The District Court dismissed the libel with costs, finding the facts substantially as stated above. The libellant had insisted that the ship was liable because the master had signed the bill of lading; and that, having been unseaworthy, she would have been liable even

without such signing, since the master had received the cattle on board. The court held, in an unpublished opinion, that while the vessel would ordinarily be liable for any damage resulting from unseaworthiness, there could be no recovery in this case, because the unseaworthiness had resulted from the conversion of the vessel into a cattle ship; that this conversion involved a change in the charter party which the master was without authority to make, *Gracie v. Palmer*, 8 Wheat. 605, 639; that the owner could not be subjected thereby to liability; that, moreover, under the terms of the charter party, the owner would be entitled to be indemnified by the charterers for any judgment in favor of Armour & Company; that the compromise made by Armour & Company with knowledge that the vessel was chartered barred this suit; and that, in any event, recovery could not be had on the allegations of the libel.

The Circuit Court of Appeals affirmed the judgment of the District Court, 297 Fed. 813. It held that the bill of lading, although signed by the master, did not indicate a purpose to bind the ship; that this fact, taken in connection with the pre-existing contract required the conclusion that the shipper's contract of affreightment was only with the Cattle Company; and that, under these circumstances, the ship could not be held. That court did not pass upon or discuss the grounds of decision adopted by the District Court. Nor did it refer to the well-established rule that the ship is ordinarily liable to the shipper upon an implied warranty of seaworthiness although a bill of lading signed by the charterer is given. See *The Carib Prince*, 170 U. S. 655, 660; *The Esrom*, 272 Fed. 266. A petition for a writ of certiorari sought on the ground that this basis of liability had been ignored was granted. 266 U. S. 597. The respondent had not opposed the granting of the writ; and it did not attempt here, in the brief and argument on the merits, to support the ground of decision stated by the Court of Appeals. It insisted that the judgment should be affirmed substantially for the reasons stated by the District Court.

The suit is brought to enforce the lien or privilege against the vessel which the maritime law gives as security for the contract of affreightment. The contract contained in the bill of lading was that of the Cattle Company. The bill of lading, which was signed

by that company, is not to be treated as an isolated transaction. It referred to a contract between the parties. It was in fact given in part performance of the obligations assumed by the Cattle Company by the original contract to purchase the cattle, assemble them at Port Limon, sell them to the Armours, and transport them to Jacksonville. The compromise agreement substituted new rights and obligations for the obligations assumed by, and the liabilities incurred under, the original contract. Thereby, it discharged the primary liabilities of the Cattle Company to the Armours under both the original contract and the bill of lading to carry safely the cattle from Port Limon to Jacksonville. The discharge of this primary liability necessarily discharged also the liability of the ship as surety for the charterers' obligation set forth in the bill of lading. For this reason, and also because of the facts found by the District Court concerning the unauthorized conversion of the vessel into a cattle ship with the participation of the Armours, the libel was properly dismissed.

An objection to the jurisdiction taken by the owner both here and below must be noticed. On the face of the libel there was confessedly admiralty jurisdiction. The contention is that the facts developed later disclosed a transaction not wholly maritime, and that, for this reason, the libel should have been dismissed under the rule declared in *Grant v. Poillon*, 20 How. 162, 168-9. The District Court stated that it was "inclined to agree with the contention," but apparently did not pass definitely upon the matter. The Circuit Court of Appeals did not mention the objection. The decree entered was a general one dismissing the libel, as on the merits. If there was no jurisdiction, the decree should have recited that ground of dismissal, so as to be without prejudice.

The case is not of that class where the existence of jurisdiction is conclusively determined by the first pleading of him who institutes the suit. Compare *Clarke v. Mathewson*, 12 Pet. 164; *Boston & Montana Mining Co. v. Montana Ore Purchasing Co.*, 188 U. S. 632. Jurisdiction in admiralty cannot be effectively acquired by concealing for a time the facts which establish that it does not exist. Compare *Lambert Run Coal Co. v. Baltimore & Ohio R. R. Co.*, 258 U. S. 377, 382. We must, therefore, consider whether the facts developed after the filing of the libel preclude the exercise of admiralty jurisdiction. The bill of lading and the charter party are

both maritime contracts and, hence, enforceable in a court of admiralty. *Morewood v. Enequist*, 23 How. 491; *The Eddy*, 5 Wall. 481, 494. The original contract to purchase, assemble, and sell the cattle, to charter vessels and therein transport the cattle to Jacksonville, and the agreement of compromise, are not maritime contracts. *The Richard Winslow*, 71 Fed. 426; *The Ada*, 250 Fed. 194. Both the original contract and the compromise agreement are referred to in order to establish the fact that the obligation for which the ship was surety had been discharged. The original contract was referred to, also, to explain the relation of the shipper named in the bill of lading to the charterer and in order to establish that by reason of their co-operation in converting the vessel into a cattle ship there was no liability. Such uses of non-maritime contracts to establish the absence of a valid maritime claim, or a defence as distinguished from a counterclaim,<sup>1</sup> see *The Eclipse*, 135 U. S. 599, 609, do not deprive the admiralty court of jurisdiction. No party to this suit sought to enforce any right under either of the non-maritime contracts.

*Affirmed.*

Mr. Justice STONE took no part in the decision of this case.

A true copy.

Test:

*Clerk, Supreme Court, U. S.*

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<sup>1</sup>Also *Willard v. Dorr*, 3 Mason 161, 171; *Southwestern Transp. Co. v. Pittsburg Coal Co.*, 42 Fed. 920; *United Transp. & Lighterage Co. v. New York & Baltimore Transp. Line*, 185 Fed. 386; *Anderson & Co. v. Susquehanna S. S. Co.*, 275 Fed. 989, 991, aff'd in 6 F. (2d) 858. Compare *The Electron*, 48 Fed. 689; *Meyer v. Pacific Mail S. S. Co.*, 58 Fed. 923. The application of Admiralty Rule 56 is limited by similar considerations of jurisdiction. *The Goyaz*, 281 Fed. 259; *Aktieselskabet Fido v. Lloyd Brasileiro*, 283 Fed. 62; *Reichert Towing Line v. Long Island Machine & Marine Const. Co.*, 287 Fed. 269. See also *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109, 123.